92-1512

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

MONROE AUTO EQUIPMENT COMPANY,
a Delaware Corporation,

Petitioner,

v.

INTERNATIONAL UNION, UNITED AUTOMOTIVE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), MONROE AUTO EQUIPMENT COMPANY UNIT OF LOCAL 878,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether the Court of Appeals for the Sixth Circuit misconstrued *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29 (1987), when it held that public policy permits an employee discharged for working under the influence of illegal drugs to be reinstated to a safety-sensitive position.

STATEMENT REQUIRED BY RULE 29.1

Monroe Auto Equipment Company is a wholly owned subsidiary of Tennessee Gas Pipeline Company (Delaware), which is a wholly owned subsidiary of Tenneco Incorporated (Delaware), a publicly held corporation. Excluding wholly owned subsidiaries, Monroe Auto Equipment Company has an ownership interest in Monroe Auto Pecas S.A. (Brazil).

Parties Below

The parties in the proceeding before the United States Court of Appeals for the Sixth Circuit were Monroe Auto Equipment Company and International Union, United Automotive, Aerospace And Agricultural Equipment Workers of America (UAW), Monroe Auto Equipment Company Unit of Local 878.

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OPINIONS BELOW

This petition seeks review of the Decision and Order of a panel of the United States Court of Appeals for the Sixth Circuit, which are reported together as *Monroe Auto Equipment Co. v. International Union, United Automotive, Aerospace & Agricultural Implement Workers of America (UAW), Monroe Auto Equipment Co. Unit of Local 878*, 981 F.2d 261 (6th Cir. 1992), and are reproduced in the Appendix to this petition at pages A-1 to A-18. The decision of the United States District Court for the Eastern District of Michigan is unreported and is set forth at pages B-1 to B-13 of the Appendix. The arbitrator's award at issue is unreported and is set forth at pages C-1 to C-23 of the Appendix.

JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit was issued on December 14, 1992. This petition is timely under 28 U.S.C. § 2101(c). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION

Section 301(a) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185(a), provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

This case presents an issue of profound urgency in the field of labor law. Specifically, it raises the question whether district and circuit courts will continue to choke the life out of the public policy exception to arbitral deference announced by this Court in *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29 (1987). The United States Court of Appeals for the Sixth Circuit's resolution of this question conflicts with *Misco* and pertinent decisions of other lower federal courts.

Monroe Auto Equipment Company ("Monroe") manufactures shock absorbers and struts for cars and trucks. It is a party to a collective bargaining agreement with the International Union, United Automotive, Aerospace and Agricultural Implement Workers of America (UAW), Monroe Auto Equipment Company Unit of Local 878 (the "Union"). David Rafko ("Rafko") was employed in the bargaining unit represented by the Union.

Using power tools and equipment, Rafko installed experimental ride control products on cars and trucks, which then were test-driven at high speeds on public highways and on Monroe's grounds. The job also required Rafko to drive test cars.

Rafko also smoked marijuana. In fact, Rafko smoked marijuana often. He smoked marijuana in the morning. He smoked it in the afternoon. And he smoked it in the evening. All told, Rafko smoked two to three marijuana cigarettes two or three times a day. Rafko also "gave" marijuana to his co-workers when they asked for it.

Under its contract with the Union, Monroe has the exclusive right to make and enforce reasonable rules and regulations, and to discharge employees for just cause. In January 1986, Monroe adopted a policy which offered employees drug counseling and rehabilitation. The policy also stated that employees were subject to discharge for "[b]eing under the influence of alcohol or drugs on Company property or on Company time," and for "[s]elling or using alcohol or drugs on Company property or on Company time." Furthermore, the policy announced the Company's "right to require any employee to take medically approved tests to determine if the employee is under the influence or has been using alcohol or illegal drugs." The 1987 revision of the policy stated that "off-the-job, illegal drug use" which "could" affect performance or jeopardize safety is "proper cause" for discipline, including termination.

In August 1989, Monroe received a letter signed "Concerned Employee." The letter stated that Rafko and other employees were trafficking in illegal drugs at work. Company officials spoke with an employee who confirmed that Rafko was selling and using drugs at work. Subsequently, a Monroe investigator interviewed three employees who said that Rafko sold drugs on Company premises.

On October 5, 1989, a workday, Monroe officials interviewed Rafko. He admitted using marijuana the previous weekend.[1] He also signed a consent form in which he acknowledged that he would be fired if he tested positive for illegal drugs. He then provided a urine specimen.

Monroe tested Rafko's urine specimen for illegal drugs. Rafko tested positive for carboxy THC, a marijuana metabolite, at a level of 242 nanograms per millileter ("ng/ml"). On October 12, Monroe terminated Rafko for testing positive and being under the influence of illegal drugs, in violation of Monroe's work rules and policies.

At the ensuing arbitration over Rafko's discharge, the Union stipulated that Rafko's drug tests were accurate. Dr. James W. Hayden, a physician and toxicologist who has treated over one thousand substance abusers and evaluated approximately ten thousand drug tests, testified that impairment from marijuana exists at 60-100 ng/ml of urinary carboxy THC. Dr. Hayden testified that the 242 ng/ml THC level present in Rafko's urine impaired his judgment and ability to perform safely any integrated task, such as driving or operating power tools. He also concluded that Rafko was working under the influence of marijuana when he was tested on October 5.

The arbitrator found that Rafko "may have been functioning at a less than optimum level." Nevertheless, the arbitrator concluded for two reasons that Monroe did not have just cause to terminate Rafko. First, the arbitrator found that there are no established legal standards defining whether someone is under the influence of marijuana. Second, the arbitrator found that Monroe's scientific evidence was insufficient to show that Rafko's marijuana use *actually* interfered with his job perfor-

[1]At the arbitration hearing, Rafko admitted he actually smoked two to three marijuana cigarettes the night before he was tested.

mance. Accordingly, the arbitrator reinstated Rafko with full seniority.

Monroe filed suit under Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, seeking an order vacating the arbitration award. In its complaint, Monroe alleged that the arbitrator's interpretation of the collective bargaining agreement violated "an explicit, well-defined and dominant public policy against the employment of drug-using individuals in potentially hazardous or dangerous positions."

Monroe and the Union filed cross motions for summary judgment. The district court granted the Union's motion and enforced the arbitrator's award. The district court recognized its authority to vacate the award if the arbitrator's interpretation of the collective bargaining agreement violated " 'some explicit public policy' " that is " 'well defined and dominant.' " (B-9 to B-10) (quoting *Misco,* 484 U.S. at 43). Moreover, the district court broadly hinted that the evidence before the arbitrator dictated findings that Rafko was under the influence while on the job and that his job performance was adversely affected. Nonetheless, the district court concluded that it was obliged to uphold the arbitrator's award in light of "the dearth of well defined and dominant legal precedents concerning public policy." (B-13).

A divided court of appeals affirmed the district court:

> The district court correctly found that the award in this case did not violate public policy. Monroe did not identify law or legal precedents which indicate that the award violated a well defined and dominant public policy. As this court explained in *Shelby County Health Care v. A.F.S.C.M.E. Local 1733*, 967 F.2d 1091, 1095 (6th Cir. 1992), "it is not sufficient that the 'grievant's conduct for which he was disciplined violated some policy or law' rather, the relevant issue is whether the arbitrator's award 'requiring the reinstatement of the grievance . . . violated some explicit public policy.' " (quoting Interstate Brands, 909 F.2d at 893). The arbitrator did not find that Rafko was impaired or intoxicated while performing his duties. This fact distin-

guishes the cases that Monroe contends supports its view. *See e.g., Delta Air Lines v. Air Line Pilots Ass'n Int'l*, 861 F.2d 665 (11th Cir. 1988) (vacating the award because flying an airplane while intoxicated violated public policy), *cert. denied*, 493 U.S. 871 (1989). The present case is closer to *Interstate Brands* where this court stated that "it does not follow . . . that any arbitration award reinstating an employee discharged for being intoxicated while off-duty, or arrested for off-duty possession of controlled substances may never be enforced without violating the public policy exception of arbitration awards." *Interstate Brands*, 909 F.2d at 893.

Monroe, 981 F.2d at 269 (A-15).

Judge David A. Nelson, dissenting, reasoned as follows:

> Although the employer's work rules did authorize termination of employment for *off-the-job* use of illegal drugs where such use could adversely affect the employee's job performance, it is undisputed that David Rafko was discharged because of drugs found in his system at a time when he was *on the job*. In the circumstances presented here, I believe, the effect of off-duty drug usage on job performance is simply irrelevant.
>
> A laboratory test of a urine specimen furnished by Mr. Rafko during working hours showed a marijuana metabolite concentration of 242 nanograms per milliliter. In the professional opinion of the employer's highly qualified expert—an opinion that stands totally uncontradicted—this scientifically valid test established that Mr. Rafko was "under the influence" of marijuana while on company property and on company time.
>
> The work rule that controls in such a situation is unambiguous. "Employee[s] will be subject to discharge," it says, for "[b]eing under the influence of alcohol or drugs on Company property or on Company time." Standard Practice Instruction IV, § 17, part I F, effective November 12, 1987. The rule provides elsewhere that "[a] determination of 'influence' may be established by a professional opinion, a scientifically valid test, and, in certain cases, such as alcohol, by a layperson's opinion."

> The arbitrator had no authority to amend the rule to say that an employee has been shown—by an uncontested professional opinion based on a scientifically valid test—to be under the influence of illegal drugs while on company time is not subject to discharge without proof that the drugs could or did interfere with his job performance. Yet that is precisely what the arbitrator did, it seems to me; he added a "job performance" proviso that he was not entitled to add.
>
> In so doing, I believe, the arbitrator refused to apply an explicit term of the work rules as written. Because the arbitrator's award thus fails to derive its essence from the agreement, it ought not to have been enforced. I am strengthened in this conclusion by the fact that the brand of industrial justice dispensed by the arbitrator is out of harmony, to say the least, with the well-defined public policy reflected in the nation's drug laws.

Id. at 271 (emphasis in original) (A-17 to A-18).

REASONS FOR GRANTING THE WRIT

In *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29 (1987), this Court reaffirmed its historically deferential attitude toward arbitration. At the same time, the Court reaffirmed the public policy exception to the general rule that arbitration awards are to be enforced so long as they draw their essence from the underlying labor agreements:

> [A] court's refusal to enforce an arbitrator's interpretation of such contracts is limited to situations where the contract as interpreted would violate 'some explicit public policy' that is 'well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests.'

Misco, 484 U.S. at 43 (quoting *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 766 (1983)). *Misco* further refined the scope of the public policy limitation:

"At the very least, an alleged public policy must be properly framed under the approach set out in *W.R. Grace*, and the violation of such a policy must be clearly shown if an award is not to be enforced." *Id.*

A. Appellate Courts Have Misconstrued *Misco* As Requiring A Specific Legal Proscription Against Reinstatement In Order To Vacate Arbitral Awards On Public Health And Safety Grounds.

In the wake of *Misco*, lower courts have paid lip service to the standards announced by this Court, reading *Misco* so restrictively that the public policy exception has been eviscerated. Indeed, in exploring "public policy" as it relates to public health and safety, lower courts have read *Misco* so narrowly that the question left unanswered by the Court in *Misco* cries out for resolution: may courts "refuse to enforce an award on public policy grounds *only* when the award itself violates a statute, regulation, or other manifestation of positive law, or compels conduct by the employer that would violate such a law"? *Id.* at 45 n.12 (emphasis provided).

Since *Misco*, only two courts of appeals have refused on the basis of public health and safety to enforce an arbitrator's reinstatement award.[2] Both cases demonstrate that courts are interpreting *Misco* as *requiring* a showing that either an arbitration award itself violates a statute or regulation or requires the employer to violate such a law.

In *Delta Air Lines*, Delta sought to vacate an arbitration award ordering the reinstatement of a pilot who was discharged after he had flown, while intoxicated, a passenger-filled Boeing 727. The

[2]*See Delta Air Lines v. Air Line Pilots Ass'n, Int'l*, 861 F.2d 665 (11th Cir. 1988), *cert. denied*, 493 U.S. 871 (1989); *Iowa Elec. Light and Power Co. v. Local Union 204 of Int'l Bhd. of Elec. Workers*, 834 F.2d 1424 (8th Cir. 1987).

Eleventh Circuit affirmed the district court's order vacating the award, holding that reinstatement violated "clearly established public policy which condemns the operation of passenger airlines by pilots who are under the influence of alcohol." *Delta Air Lines*, 861 F.2d at 671.

The Eleventh Circuit observed that *Misco* required it to answer the question "does an established public policy condemn the performance of employment activities in the manner engaged in by the employee?" *Id.* The court then examined a Federal Aviation Administration regulation and forty state statutes, all of which prohibit flying while intoxicated. Noting that "It may be remarkable to find in any field of public opinion and policy such unanimity and total absence of dissent," *id.* at 674, the court concluded that public policy would be offended by the pilot's reinstatement.

Ostensibly, the Eleventh Circuit adhered to *Misco*; however, a close examination of *Delta Air Lines* reveals that the Eleventh Circuit read *Misco* far more narrowly than this Court had intended. Indeed, the Eleventh Circuit implicitly interpreted *Misco* as permitting a court to "refuse to enforce an award on public policy grounds only when the award itself violates a statute, regulation, or other manifestation of positive law, or compels conduct by the employer that would violate such a law." *Misco*, 484 U.S. at 45 n.11. Specifically, the Eleventh Circuit reasoned:

> Here, it is the employee *qua* employee who is the wrongdoer. It is [the pilot's] employment which made his intoxication violate law and public policy. [The pilot] could not correct his offensive conduct without altering the performance of his employment duties. He could not continue his offensive conduct and yet perform his employment duties legally. *Furthermore, Delta could not permit Day to continue to perform his employment duties while his offensive conduct continued, without being an accessory to the wrongdoing.*

Delta Air Lines, 861 F.2d at 671 (emphasis provided). Plainly, the Eleventh Circuit concluded that the pilot's reinstatement and the arbitrator's award would have the effect of mandating illegal conduct by the airline. This conclusion misreads *Misco* and construes the public policy exception so narrowly that it virtually ceases to exist.

Similarly, in the only other post-*Misco* appellate court decision refusing to enforce a reinstatement award on the basis of public health and safety, the Eighth Circuit interpreted *Misco* to require a showing that the award itself either violates a statute or regulation, or requires the employer to violate such a law. *See Iowa Electric*, 834 F.2d at 1428. There, an arbitrator reinstated a machinist who had been discharged for deliberately violating Nuclear Regulatory Commission ("NRC") regulations. The Eighth Circuit examined NRC regulations and concluded that "[n]othing could be plainer than the public interest in the safe operation of nuclear power plants that underlies this panoply of federal regulations." *Id.* The court then held that this public policy would be harmed by the reinstatement of an employee who "gambl[ed] with the public well-being by flouting a safety rule in a nuclear power plant." *Id.* at 1429.

The Eighth Circuit acknowledged that under *Misco*, it was "not required to find that the award itself is illegal before we overrule the arbitrator on public policy grounds." *Id.* at 1427 n.3. The Eighth Circuit's opinion appears simply to deny the enforcement of a reinstatement award because the award violated clearly established public policy. Yet, there is more to *Iowa Electric* than meets the eye. Circuit Judge Heaney, concurring, observed:

> It troubles me, however, that we may be sending a message to the nuclear power industry that a company can satisfy the regulatory authorities by discharging an employee, even though the company itself may be guilty of safety violations.

Id. at 1430. The majority responded by noting, "We agree with Judge Heaney's concurrence that a company may not be able fully to meet its regulatory requirements merely by firing an employee who violates a safety rule." *Id.* at 1429 n.4. Thus, *Iowa Electric* suggests that the existence of a specific legal proscription against reinstatement is what makes reinstatement so offensive to public policy.

Read in isolation, *Iowa Electric* and *Delta Air Lines* are disturbing because of their extraordinarily restrictive reading of *Misco*. They are even more striking when read in conjunction with a line of pre-*Misco* cases. Indeed, *Iowa Electric* and *Delta Air Lines* resurrect precedents from the Ninth and District of Columbia Circuits which held that the public policy exception applies only when an arbitration award renders a labor contract unlawful or directs a party to take unlawful action.[3] Thus, *Iowa Electric* and *Delta Air Lines* demonstrate that this Court must now decide the issue "left for another day" in *Misco*, 484 U.S. at 46 (Blackmun, J., concurring): "whether a court may refuse to enforce an arbitration award rendered under a collective-bargaining agreement on public policy grounds only when the award itself violates positive law or requires unlawful conduct by the employer." *Id.*

B. The Sixth Circuit's Decision Conflicts With *Misco* Because The Arbitrator's Award Violates The Public Policy Against Employing Drug-Impaired Individuals in Safety-Sensitive Positions.

The manifestly restrictive application of *Misco* in *Delta Air Lines* and *Iowa Electric* is reason enough to warrant plenary

[3]*See Bevles Co., Inc. v. Teamsters Local 986*, 791 F.2d 1391 (9th Cir. 1986) (court enforced award requiring employer to reinstate employees discharged because they were undocumented aliens), *cert. denied*, 484 U.S. 985 (1987); *American Postal Workers Union v. United States Postal Serv.*, 789 F.2d 1, 8 (D.C. Cir. 1986) ("[t]he arbitrator's award was not itself unlawful, for there is no legal proscription against the reinstatement of a person such as the grievant. . . . [a]nd the award did not otherwise have the effect of mandating any illegal conduct").

review by this Court. But the need for prompt review is magnified by the Sixth Circuit's direct departure from *Misco*.

Since *Misco*, federal courts have recognized a dominant public policy against arbitral reinstatement where the safety of the general public is implicated. *See Delta Air Lines*, 861 F.2d at 674; *Iowa Electric*, 834 F.2d at 1427; *Exxon Shipping Co. v. Exxon Seamen's Union*, 801 F. Supp. 1379, 1388 (D.N.J. 1992) ("Exxon I") (vacating reinstatement of able bodied seaman discharged for having a blood alcohol level three to four times the level permitted by company policy, finding "the existence of a well defined and dominant public policy against having intoxicated persons operate commercial vessels"); *Union Pacific R.R. Co. v. United Transp. Union*, 794 F. Supp. 891, 894 (D. Neb. 1992) (vacating reinstatement of railroad brakeman discharged for testing positive for alcohol, cocaine and marijuana, concluding "there is a well-defined public policy . . . against reinstating railroad employees in safety sensitive" jobs); *Exxon Shipping Co. v. Exxon Seamen's Union*, 788 F. Supp. 829, 843 (D.N.J. 1992) ("Exxon II") (vacating reinstatement of oil tanker helmsman who tested at 31 ng/ml of carboxy THC, and recognizing "a well defined and dominant national policy . . . against having drug users operate commercial vessels"); *Georgia Power Co. v. International Bhd. Elec. Workers, Local 84*, 707 F. Supp. 531, 538 (N.D. Ga. 1989), *aff'd mem.*, 896 F.2d 507 (11th Cir. 1990) (vacating reinstatement of employee discharged for operating hazardous machinery at a carboxy THC level between 300 and 700 ng/ml, and recognizing "a well-defined and dominant public policy against the use of illegal drugs by those engaged in potentially hazardous duties").

Here, Monroe undoubtedly employed Rafko in a safety-sensitive position. Rafko was not merely a mechanic. He installed experimental ride control mechanisms—shock absorbers and struts—in cars and trucks. Those motor vehicles were then test-driven at high speeds on Michigan's public highways and

Monroe's testing grounds, where data were gathered concerning the performance of the ride control devices. Thus, Rafko's job was safety-sensitive in three ways. Foremost, the vehicles Rafko equipped with experimental shocks and struts traveled at high speeds on public highways and thereby imperiled the safety of persons using Michigan's roads. Next, the test drivers' safety was jeopardized. Finally, manufacturing decisions were based on the data Monroe gathered from the experimental shocks and struts which Rafko had installed; faulty data could imperil the safety of an entire segment of the shock and strut market.

In light of the obvious threat posed by Rafko's drug abuse to his fellow employees and the general public, the Sixth Circuit abdicated its responsibility to examine laws and legal precedent for a well defined and dominant public policy. To this end, *Georgia Power* is particularly instructive. There, grievant-Watson's primary responsibility was to ensure that high pressure equipment did not overheat and that valves were properly positioned. When a drug test revealed over 300 ng/ml carboxy THC in Watson's system, he was discharged pursuant to a collective bargaining agreement provision which prohibited reporting to work under the influence of drugs. The arbitrator found that Watson was a chronic marijuana user who had smoked it the week before the test. He also found that such chronic use was associated with lethargy and inattention, which would affect Watson's job performance, and that Watson was "probably" under the influence of marijuana when tested. *Georgia Power*, 707 F. Supp. at 534. Nevertheless, the arbitrator held there was insufficient cause to terminate him.

The district court concluded that the award violated public policy, observing: "As with the pilot in *Delta*, it is Watson's *employment* which makes his conduct contrary to public policy. Moreover, the plaintiff . . . could not permit Watson to 'continue to perform his employment duties while his offensive conduct

continued without being an accessory to the wrongdoing.' " *Id.* at 536 (emphasis in original). The court explained:

> In ordering the reinstatement of Watson, the arbitrator has construed the collective bargaining agreement in such a manner that it appears that plaintiff has agreed to submit to arbitration the question as to whether it should authorize operation of potentially hazardous electrical equipment and machinery by employees while they are under the influence of illegal drugs. The court must therefore ascertain by 'reference to the laws and legal precedent' whether there is some explicit public policy that is 'well defined and dominant' which would prohibit [the company] from entering into such a contract.

Id.

The court then focused on the many statutes and regulations that are inconsistent with the reinstatement of a drug user who operates hazardous equipment. It cited Executive Order 12564, 51 Fed. Reg. 32,889 (1986) (President Reagan's initiative to create a drug-free workplace); the Drug-Free Workplace Act of 1988, 41 U.S.C. § 701 *et seq.*; the Controlled Substances Act, 21 U.S.C. § 801(2); the Drug Free Schools and Communities Act, 20 U.S.C. § 4601(4); and the Occupational Safety and Health Act, 29 U.S.C. § 651 *et seq.* Adhering to *Misco*'s teachings, the court concluded that the arbitrator's reinstatement award violated the "well-defined and dominant public policy denouncing the operation of potentially hazardous equipment and machinery by employees under the influence of illegal drugs." *Id.* at 539.

Here, by contrast, the Sixth Circuit ignored the teachings of *Misco*. It summarily concluded—with one sentence of analysis—that "Monroe did not identify law or legal precedents which indicate that the award violated a well defined and dominant public policy." *Monroe*, 981 F.2d at 269 (A-15). In so concluding, the court was oblivious to Monroe's compelling showing that Rafko's reinstatement violated the dominant public policy against the employment of drug-users in safety sensitive positions.

The Sixth Circuit's analysis failed to examine whether the arbitrator's award "created any explicit conflict with other 'laws and legal precedents.' " *Misco*, 484 U.S. at 43. The court failed to ascertain "by reference to the laws and legal precedents" whether the award violated "some explicit public policy." *W.R. Grace*, 461 U.S. at 766. Instead, it offered a perfunctory, almost nonexistent, evaluation of public policy.

In doing so, the court ignored an abundance of federal and state laws that denounce the operation of potentially hazardous equipment and machinery by substance-abusing employees. Thus, the Sixth Circuit turned a deaf ear to the Drug-Free Workplace Act of 1988,[4] the Occupational Safety and Health Act,[5] and the Controlled Substances Act[6]—the very statutes cited by the courts in *Georgia Power*, *Exxon I* and *Exxon II* as constituting well defined and dominant public policies against having employees under the influence of illegal drugs operate potentially hazardous equipment and commercial vessels. Significantly, the Sixth Circuit also ignored the Omnibus Transportation Employee Testing Act of 1991, in which Congress found:

> [T]he greatest efforts must be expended to eliminate the abuse of alcohol and use of illegal drugs, *whether on duty or off duty*, by those individuals who are involved in the operation of aircraft, trains, trucks, and buses.

Pub. L. 102-143, Section 2, 105 Stat. 953, 953 (1991) (emphasis added) (codified in scattered sections of 49 App. U.S.C. and 45 U.S.C.). Likewise, the Sixth Circuit ignored numerous Michigan laws which evidence the public policy prohibiting the employ-

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[4]The Act requires federal contractors, like Monroe, to certify that they will provide a "drug-free workplace." 41 U.S.C. § 701(a)(1).

[5]OSHA requires every employer to "furnish . . . a place of employment . . . free from recognized hazards." 29 U.S.C. § 654(a).

[6]That Act proclaims that "[t]he illegal . . . and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people." 21 U.S.C. § 801(2).

ment of drug-impaired persons in safety-sensitive positions.[7] These public laws, designed to foster a drug-free workplace and emphasizing the dangers of drug use, comprise a well defined public policy against employing drug users in safety-sensitive positions. The Sixth Circuit ignored this public policy in concluding that "Monroe did not identify law or legal precedents which indicate that the award violated a well defined and dominant public policy." *Monroe*, 981 F.2d at 269. In so doing, the court defied this Court's teachings in *Misco*.

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[7]*See* Mich. Comp. Laws § 37.1103(f)(i) & 1211(a) (excluding marijuana abusers from the definition of handicapped persons and giving employers the right to "[e]stablish employment policies, programs, procedures, or work rules regarding the use of" illegal drugs); Mich. Comp. Laws § 257.625(1) (prohibiting the operation of cars by drivers impaired by marijuana); Mich. Comp. Laws § 333.6201 & 6203 (creating office of Drug Agencies to recommend and implement workplace drug abuse programs in the State of Michigan); Mich. Comp. Laws § 333.7401 & 7403 (criminalizing marijuana).

CONCLUSION

This case presents issues of national significance that merit this Court's attention. The Court should take this opportunity to reaffirm its teachings in *Misco* and, at the same time, send a strong message condemning the use of illegal drugs by employees in safety-sensitive positions. The Sixth Circuit's message is that employers must comply with arbitral reinstatement decisions which place the safety of the general public in the hands of acknowledged drug-users. That message cannot be the law.

For the reasons stated, this Court should grant Monroe's Petition for Certiorari, summarily vacate the Sixth Circuit's Decision and Order, and vacate the arbitrator's award. Alternatively, the Court should grant the Petition and give the case plenary consideration.

Respectfully submitted,

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March 15, 1993

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APPENDIX

United States Court of Appeals

FOR THE SIXTH CIRCUIT

MONROE AUTO EQUIPMENT COMPANY,
Plaintiff-Appellant,
v.
INTERNATIONAL UNION, UNITED AUTOMOTIVE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), MONROE AUTO EQUIPMENT COMPANY, UNIT OF LOCAL 878,
Defendant-Appellee.

ON APPEAL from the United States District Court for the Eastern District of Michigan

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Decided and Filed December 14, 1992

Before: KEITH and NELSON, Circuit Judges; and LIVELY, Senior Circuit Judge.

LIVELY, Senior Circuit Judge, delivered the opinion of the court, in which KEITH, Circuit Judge, joined. NELSON, Circuit Judge (pp. 19-20), delivered a separate dissenting opinion.

LIVELY, Senior Circuit Judge. This is an appeal by an employer from a district court judgment enforcing a labor arbitrator's award. The grievance contested dismissal of an employee for violation of the employer's policy prohibiting possession of illegal drugs in the workplace or being under the influence of such drugs while at work. The arbitrator held that the employer had not

proven that the employee was impaired or was under the influence of drugs, and ordered him reinstated.

I.

The plaintiff, Monroe Auto Equipment Company (Monroe) filed this action against International Union, United Automotive, Aerospace and Agricultural Implement Workers of America (UAW). Monroe sought to vacate and set aside an arbitration award rendered under the collective bargaining agreement between the parties. The UAW filed a counterclaim for enforcement of the arbitrator's award. The district court granted the defendant's summary judgment motion and awarded the defendant its costs and attorney fees.

A.

Monroe is a manufacturer of shock absorbers and struts for cars and trucks. It is a party to a collective bargaining agreement (Agreement) with the UAW.

Monroe instituted an Alcohol and Drug Abuse Program policy statement in August 1985, which provided for disciplinary action up to discharge of any employee found to be under the influence of alcohol or drugs on company property or on company time. The policy statement was amended in November 1987 to provide for discharge of employees for using illegal drugs while off the job. This statement provided, in part, "Off-The-Job, Illegal Drug Use which could adversely affect an employee's job performance or which could jeopardize the safety of other employees, the public, or company equipment is proper cause for administrative or disciplinary action up to and including termination of employment."

In 1988 Monroe promulgated work rules, one of which prohibited being under the influence of alcohol or controlled substances

while on company property. The previously adopted policy statement had defined "under the influence" as follows:

> For purposes of this policy, "under the influence" means that the person is affected by a drug or alcohol, or the combination thereof, in a detectable manner. The symptoms of influence are not necessarily confined to those consistent with misbehavior, nor limited to obvious impairment of physical or mental ability, such as slurred speech or difficulty in maintaining balance. A determination of "influence" may be established by a professional opinion, a scientifically valid test, and in certain cases, such as alcohol, by a layperson's opinion.

Finally, in May 1989 Monroe promulgated a Corporate Policy Statement on a Drug-Free Workplace that included the following:

> Monroe Auto Equipment Company has a vital interest in maintaining a safe, healthful, and productive work environment in order to protect our employees, property, safety, and efficiency of operations. Therefore, it is the policy of the Company to take immediate disciplinary action, up to and including discharge, of any employee who engages in the use or possession of illegal drugs or the use of alcohol in the workplace. This also includes being "under the influence" of any illegal drug or alcohol used prior to reporting to the workplace.

B.

David Rafko was a Monroe mechanic represented by the UAW. Rafko's job consisted mainly of the installation of experimental ride control products on cars. He drove test cars occasionally, but spent most of his time under automobiles installing equipment.

In August 1989, Monroe received an anonymous letter stating that Rafko and another employee were trafficking in drugs at work. Monroe conducted an investigation and Rafko was interviewed on Thursday, October 5, 1989. He denied dealing drugs,

but did admit using marijuana during the previous weekend. Rafko then signed a drug-testing consent form. Rafko's October 5 urine specimen was positive for carboxy THC, a metabolite of marijuana, at a level of 242 ng/ml. Rafko was terminated for illegal drug use and for being under the influence of drugs in violation of Monroe's work rules and policies.

Rafko and the UAW filed a grievance. The UAW stipulated that Rafko's drug tests were accurate. The arbitrator found that Monroe was advised that the test level constituted being under the influence of marijuana and that Rafko admitted he had smoked marijuana the night before he was tested. The arbitrator also noted that company witnesses admitted that Rafko had never been observed to be under the influence of drugs or found to have performed his work unsatisfactorily. One supervisor testified, however, that Rafko was disorganized at times, and Rafko admitted that he tended to tire easily when he smoked marijuana. The employee of Monroe's parent corporation who conducted the investigation conceded that he could not tell if Rafko was under the influence of a drug when he interviewed him on October 5.

Monroe's expert witness, Dr. James Hayden, a consultant on drugs and toxicology matters, described the effects of marijuana to include loss of judgment, inhibition, time perception, and motor coordination. Dr. Hayden stated that under current views of his profession between 60 and 100 ng/ml of THC in the urine would indicate being under the influence of marijuana. The witness conceded, however, that there is no legal definition or standard for determining when a person is under the influence of marijuana as there is for being under the influence of alcohol. He also testified that no studies had defined the difference between being "under the influence" and being "impaired." Noting that Rafko's test level was far above suggested levels both for being under the influence and being impaired, Dr. Hayden expressed the opinion that Rafko was under the influence of marijuana when tested.

II.

The parties stipulated that three issues were presented to the arbitrator for decision. The first two issues related to alleged violations by Monroe of the National Labor Relations Act of 1947, as amended (LMRA) in handling Rafko's case, and the third concerned whether Rafko was discharged for "just cause."

First, the UAW alleged that Monroe had refused to bargain over its drug and alcohol policies. The arbitrator made a credibility finding that Monroe had distributed its drug policy statements to the union and that the union had had an opportunity to challenge the policies during their most recent negotiations, prior to implementation of the policies, but had failed to do so. Thus, the UAW waived any right to contend that the policies were implemented in violation of the LMRA. Although the UAW has not directly contested this ruling by the arbitrator, it continues to argue that there is some significance to the fact that the policy statements and work rules were never formally incorporated into the Agreement.

The second issue concerned Rafko's claim that he was entitled to be represented at the October 5th confrontation by the local union president or another member on a bargaining committee list. Rafko was actually represented by a local union vice-president. The arbitrator found no violation, inasmuch as the local president was involved in the investigation, and Rafko received adequate representation from the vice-president. The UAW has not contested this procedural ruling on appeal.

With respect to the third issue, whether Monroe discharged Rafko for just cause, the arbitrator looked first to the question of whether the drug abuse policies found to apply to this case are compatible with the Agreement. The arbitrator concluded that the off-the-job provisions are compatible with the Agreement only to the extent that off-duty behavior affects the operation of the employer's business. As a general rule, an employer's right to

discipline employees is confined to work-related matters. When seeking to justify discipline for off-duty conduct, an employer has the burden of proving a connection between facts developed in a particular case and a detrimental effect on its business. That connection and effect must be reasonable and discernible "such as could logically be expected to cause some result in the employer's affairs."

The arbitrator found that Monroe was justified in requiring Rafko to submit to the drug urine test, but stated that drug use does not in itself justify discharge. The Monroe policy with respect to off-premises drug use recognizes this limitation, the arbitrator found, by providing discipline only for such use "which could adversely affect an employee's job performance or which could jeopardize the safety of other employees, the public, or Company property."

After reviewing Dr. Hayden's testimony the arbitrator concluded that Monroe had discharged Rafko without just cause, stating:

> The Company has relied on scientific evidence that is less than conclusive as to whether the Grievant's off-duty use of marijuana actually interfered with his job performance. The evidence does not suffice, either to demonstrate that discharge was warranted by terms of Company policy, or that there was just cause for such action.

The award required Monroe to reinstate Rafko without loss of seniority and remanded the matter to the parties to determine "penalties or compensation, if any." Instead, Monroe filed a timely action in district court pursuant to § 301 of the LMRA, 29 U.S.C. § 185, and appealed to this court following the district court's entry of summary judgment for the UAW affirming the decision and enforcing the award.

III.

A.

Monroe presents three issues on appeal. First, it contends that the arbitrator's award does not draw its essence from the Agreement and that the arbitrator exceeded his authority. Second, Monroe asserts that the award violates public policy by ordering reinstatement and return to the workplace of an employee who admitted using illegal drugs. Third, Monroe argues that the district court erred in awarding attorney fees to the UAW.

B.

As in other cases where the district court grants summary judgment, we review a grant of summary judgment in labor arbitration cases *de novo. Dallas & Mavis Forwarding Co. v. General Drivers, Warehousemen & Helpers, Local Union No. 89,* 972 F.2d 129, 133 (6th Cir. 1992). Nevertheless, our scope of review is extremely limited. As the Supreme Court made clear in the *Steelworkers Trilogy,*[1] when parties to a collective bargaining agreement provide for arbitration of grievances and disputes they have bargained for an arbitrator's decision, not the decision of a court.

The Supreme Court recently reaffirmed and explained this cardinal rule in *United Paperworkers International Union v. Misco, Inc.,* 484 U.S. 29 (1987). Writing for a unanimous Court in *Misco,* Justice White stated:

> The reasons for insulating arbitral decisions from judicial review are grounded in the federal statutes regulating labor-management relations. These statutes reflect a decided preference for private settlement of labor disputes without the intervention of government: The Labor Management Relations Act

[1] *United Steelworkers of America v. Enterprise Wheel & Car Corp.,* 363 U.S. 593 (1960); *United Steelworkers of America v. Warrior & Gulf Navig. Co.,* 363 U.S. 574 (1960); *United Steelworkers of America v. American Mfgr. Co.,* 363 U.S. 564 (1960).

> of 1947, 61 Stat. 154, 29 U.S.C. § 173(d), provides that "[f]inal adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." The courts have jurisdiction to enforce collective-bargaining contracts; but where the contract provides grievance and arbitration procedures, those procedures must first be exhausted and courts must order resort to the private settlement mechanisms without dealing with the merits of the dispute. Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept. Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts. To resolve disputes about the application of a collective-bargaining agreement, an arbitrator must find facts and a court may not reject those findings simply because it disagrees with them. The same is true of the arbitrator's interpretation of the contract. The arbitrator may not ignore the plain language of the contract; but the parties having authorized the arbitrator to give meaning to the language of the agreement, a court should not reject an award on the ground that the arbitrator misread the contract.

Id. at 37-38 (citations omitted). Defining further the paramount position to be accorded in an arbitrator's award, Justice White wrote:

> As the Court has said, the arbitrator's award settling a dispute with respect to the interpretation or application of a labor agreement must draw its essence from the contract and cannot simply reflect the arbitrator's own notions of industrial justice. But as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.

Id. at 38.

IV.

With these principles in mind, we turn to the first issue—whether the arbitrator's award drew its essence from the Agreement and whether the arbitrator exceeded his authority.

A.

Only if we conclude that the arbitrator was not even "arguably construing or applying the contract" in this case or was not "acting within the scope of his authority" may we refuse to enforce the award. *Misco*, 484 U.S. at 38. Monroe contends that the arbitrator did exceed his authority by refusing to apply the definition of "under the influence" contained in the Agreement, and substituting for it his own definition. Further, Monroe argues, the arbitrator based his award on the conclusion that Monroe had failed to prove that Rafko was under the influence of marijuana as erroneously defined by the arbitrator. Thus, the award did not draw its essence from the Agreement. By ignoring the work rules, which defined "under the influence" in clear and unambiguous terms, Monroe asserts, the arbitrator imposed a burden of proof on Monroe to meet a standard of certainty not provided for by the Agreement.

The work rules permit Monroe to discharge an employee who is under the influence on company property and provide that one way to establish the "under the influence" condition is by "a scientifically valid test" or "a professional opinion." It is Monroe's position that Dr. Hayden's testimony satisfied this standard, and that the arbitrator had no authority to ignore these provisions and base his award on his own conception of the requirements for proving an employee to be under the influence of drugs.

At oral argument Monroe emphasized the fact that the drug policy provides for discharge of an employee whose condition *could* adversely affect job performance or jeopardize the safety of

other employees, etc., whereas the arbitrator based his determination upon a finding that Monroe's scientific evidence was insufficient to show that Rafko's off-duty use of marijuana *actually* interfered with his job performance. This amounted to application of a standard not contained in any of the drug policy documents, and was beyond the arbitrator's authority, according to Monroe.

Monroe also disputes the district court's basis for upholding the award. The district court interpreted the arbitrator's decision as resting the award upon a determination that the definition of "under the influence" contained in the work rules is "too vague to enforce." The court stated that under general contract principles vague language cannot be given effect unless both parties to a contract agree on its meaning. Because there are no clearly established standards for ascertaining whether a person is under the influence of marijuana, the court held, in effect, that Monroe could not discharge an employee for that rules infraction without setting a specific test result or other definite criterion for determining the condition.

B.

The UAW responds that the arbitrator did not ignore the language or refuse to apply explicit terms of the Agreement. Rather, he acted within his authority by interpreting the agreement and finding that Monroe did not carry its burden of proving that Rafko was in fact under the influence of marijuana on October 5, 1989. He reached this conclusion, the UAW asserts, not by departing from the Agreement, but after considering Dr. Hayden's testimony in light of the definition contained in the rules.

The arbitrator's ultimate conclusion that Rafko's discharge could not be sustained was based on his finding that Monroe's proof fell short of satisfying the very definitions contained in the rules. The UAW maintains that the arbitrator's decision recognized that Monroe may make a determination of whether an employee is under the influence of drugs in reliance upon a scien-

tifically valid test or a professional opinion. The arbitrator found, however, that Dr. Hayden's testimony revealed that there is no consensus in the scientific community with respect to a valid test for determining when a person is under the influence of marijuana. These very uncertainties led the arbitrator to conclude, according to the UAW, that Dr. Hayden's professional opinion on the subject was not determinative. Thus, the UAW argues, the arbitrator, though agreeing that Monroe is free to base its determination that an employee is under the influence on a valid scientific test or a professional opinion, it has the burden of proving that the test is valid and the opinion is properly supported.

The UAW seeks to defend the district court's opinion by arguing that use of the word "may" in reference to determining whether a person is under the influence of drugs on the basis of a scientific test or professional opinion precludes finding that such a test or opinion automatically establishes that condition.

Finally, the UAW contends, Monroe had the burden of proving that a discharge based upon such reliance was for "just cause."

V.

Article II of the Agreement gives Monroe the exclusive right to determine the conduct of its business, including the right to discipline and discharge employees for just cause. Given the arbitrator's finding that the UAW waived its right to bargain about Monroe's drug policy and work rules when it had an opportunity to do so, we believe the arbitrator correctly found that the policy and rules apply to Rafko's case even though they were never formally incorporated into the Agreement.

A.

The authority to promulgate and enforce the drug policy and work rules derives from Monroe's Article II power to discipline for just cause. Because Rafko used marijuana while off duty and away from the workplace, the only basis upon which the company could discipline him for that use was for being under the

influence of the drug while on company property. The arbitrator clearly recognized the definition of "under the influence" contained in the policy statement and sought to apply it to Rafko's case.

The arbitrator's statement that the evidence did not establish that Rafko's off-duty use of marijuana actually interfered with his job performance followed a recitation of the fact that Monroe's witnesses testified they observed no abnormal behavior or any indication that Rafko did not properly perform his work on October 5, 1989. Then, immediately after making the observation concerning actual interference with job performance, the arbitrator stated: "The evidence does not suffice, either to demonstrate that discharge was warranted by terms of Company policy, or that there was just cause for such action."

Properly read, the arbitrator's decision states that there were two possible bases upon which Monroe could have discharged Rafko for being under the influence of marijuana: either that he was actually impaired to the extent that it interfered with his work or that he was impaired to the extent that his impairment could adversely affect job performance or jeopardize the safety of other employees. If he had been visibly impaired, that would have been just cause for discharge, without more. Because he was not visibly impaired, however, Monroe proceeded on the basis of a professional opinion that the test results established that Rafko's job performance could have been impaired. Only if the professional opinion were bolstered by a degree of certainty found lacking in this instance would a discharge in reliance on the opinion be discipline for just cause.

B.

There is clearly room for disagreement with the arbitrator's decision and award. Nevertheless, his decision demonstrates that he was interpreting the drug policy in light of the employer's right to discharge only for just cause, and we may not review the

merits of the award. Monroe's policy provides a definition of "under the influence" that is confined to a condition where "the person is affected by a drug or alcohol, or the combination thereof, *in a detectable manner.*" The policy then states that symptoms of influence such as misbehavior or obvious impairment of physical or mental ability exhibited by such signs as slurred speech or difficulty in maintaining balance need not be present for a person to be affected in a detectable manner. The person may also be found to be affected by drugs or alcohol in a detectable manner if such "influence" is established by a scientifically valid test or a professional opinion.

We do not agree with the district court's conclusion that the arbitrator denied application of the drug policy to Rafko because the policy was too vague to enforce. We find nothing in the arbitrator's decision or award to support such a reading. Nevertheless, we agree with the district court that the award must be enforced. The award draws its essence from the agreement, and the arbitrator did not exceed his authority or impose "his own brand of industrial justice." *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. at 597.

We have held that an award may be vacated only when the arbitrator "refuse[s] to apply explicit terms of the agreement" or renders an award in "direct contradiction of unambiguous terms of the agreement." *International Ass'n of Machinists v. Lourdes Hospital, Inc.*, 958 F.2d 154, 156 (6th Cir. 1992). Similarly, we stated in *Dallas & Mavis Forwarding Co.*, 972 F.2d at 134 that "[a]n award fails to derive its essence from the agreement when (1) it conflicts with express terms of the agreement; (2) it imposes additional requirements not expressly provided for in the agreement; (3) it is not rationally supported by or derived from the agreement; or (4) it is based on 'general considerations of fairness and equity' instead of the exact terms of the agreement." (citations omitted).

In our opinion, the award in this case transgressed none of these prohibitions. Specifically, the arbitrator did not impose an "additional requirement not expressly provided for in the agreement" when he observed that Monroe's proof fell short of establishing that Rafko's off-duty use of marijuana actually interfered with his job performance. He recognized Monroe's right to discipline an employee for such use of a drug as could adversely affect job performance, but found from the evidence that Monroe had failed to establish either that Rafko's use of marijuana the night before the test could have had this effect or that it actually did so. Whether correct or not, that finding is not subject to review by a court.

VI.

Monroe also argues that the award should be vacated and set aside because it violates public policy. The Supreme Court stated in *W. R. Grace & Co. v. Rubber Workers,* 461 U.S. 757, 766 (1983), that "a court may not enforce a collective-bargaining agreement that is contrary to public policy." Applying this principle to review of an arbitrator's award, the Court stated that if a contract, as interpreted by the arbitrator, violates "some explicit public policy," the Court would refrain from enforcing it. *Id.* Further defining the reach of this character of review, the Court cautioned that the public policy "must be well defined and dominant" and be discovered "by reference to the laws and legal precedents and not from general considerations of supposed public interests." *Id.* (quoting *Muschany v. United States,* 324 U.S. 49, 66 (1945).

The Supreme Court interpreted *W. R. Grace* in *Misco,* making it clear that the Court did not "otherwise sanction a broad judicial power to set aside arbitration awards as against public policy." 484 U.S. at 43. The award must create an explicit conflict with a public policy established by laws and legal precedents; it cannot be set aside on the basis of common sense or on specula-

tion by a court as to public policy. *Id.* at 43-44. We applied these rules to reverse a district court's judgment vacating an arbitration award on public policy grounds in *Interstate Brands v. Teamsters Local Union No. 135,* 909 F.2d 885, 892-94 (6th Cir. 1990), *cert. denied,* 111 S. Ct. 1104 (1991).

The district court correctly found that the award in this case did not violate public policy. Monroe did not identify law or legal precedents which indicate that the award violated a well defined and dominant public policy. As this court explained in *Shelby County Health Care v. A.F.S.C.M.E. Local 1733,* 967 F.2d 1091, 1095 (6th Cir. 1992), "it is not sufficient that the 'grievant's conduct for which he was disciplined violated some policy or law' rather, the relevant issue is whether the arbitrator's award 'requiring the reinstatement of the grievance . . . violated some explicit public policy.' " (quoting *Interstate Brands,* 909 F.2d at 893). The arbitrator did not find that Rafko was impaired or intoxicated while performing his duties. This fact distinguishes the cases that Monroe contends support its view. See *e.g., Delta Air Lines v. Air Line Pilots Ass'n Int'l,* 861 F.2d 665 (11th Cir. 1988) (vacating the award because flying an airplane while intoxicated violated public policy), *cert. denied,* 493 U.S. 871 (1989). The present case is closer to *Interstate Brands* where this court stated that "it does not follow . . . that any arbitration award reinstating an employee discharged for being intoxicated while off-duty, or arrested for off-duty possession of controlled substances may never be enforced without violating the public policy exception of arbitration awards." *Interstate Brands,* 909 F.2d at 893.

VII.

The district court awarded attorney fees to the UAW without any discussion of its reasoning. The LMRA has no fee-shifting provision. The UAW seeks to support the award of attorney fees here on the basis that since arbitration is the preferred method of settling labor disputes and the courts are severely limited in their

review of arbitration awards, attorney fees should be awarded against a party that unsuccessfully seeks to set aside an award. This general deterrence argument is unavailing.

A district court's award or denial of attorney fees is reviewed for abuse of discretion. *Black v. Ryder/P.I.E. Nationwide, Inc.*, 970 F.2d 1461, 1472 (6th Cir. 1992). The general rule in the United States is that a prevailing party may not ordinarily recover attorney fees in the absence of a statute or enforceable contract providing for a fee award. *Shimman v. International Union of Operating Engineers, Local 18,* 744 F.2d 1226, 1229 (6th Cir. 1984) (en banc), *cert. denied,* 469 U.S. 1215 (1985). Neither party contends there is any specific statutory authority or contract right in the present case. The only exception to the American rule that could possibly apply to this case is the "bad faith" exception. We can find no basis for applying it. This court in *Ray A. Scharer and Co. v. Plabell Rubber Products,* 858 F.2d 317, 320 (6th Cir. 1988), explained that exception by stating that the "normal [American] rule does not apply, however, where a party or counsel have acted in bad faith in the instigation or conduct of litigation, and in those circumstances, the court has the inherent authority to assess an award of attorney's fees against either the litigant or his attorney." (citations omitted). The court went on to say that "[a]n award of attorney's fees . . . is an extreme sanction, and must be limited to truly egregious cases of misconduct." *Id.* (citation omitted).

The district court abused its discretion by awarding attorney fees because it cannot be said that Monroe acted in bad faith in bringing this action. Monroe has consistently acknowledged the courts' limited scope of review but has maintained that this arbitration award should be vacated because the award did not draw its essence from the agreement and that it violated public policy. *Misco* does not preclude either of these arguments and in fact Monroe made a good faith effort to argue that the award was similar to the award in *Lourdes* that this court vacated because

an arbitrator cannot "refuse to apply explicit terms of the agreement" or render an award in "direct contradiction of unambiguous terms of the agreement." *Lourdes*, 958 F.2d at 156. Monroe contended throughout the proceedings that the award failed to apply explicit terms of the agreement. Neither this argument nor Monroe's public policy argument can be found to have been made in bad faith.

These facts distinguish the present case from the cases cited by the UAW in which attorney fee awards were approved. For example, in *Dreis & Krump Mfg. v. International Ass'n of Machinists & Aerospace Workers,* 802 F.2d 247, 249 (7th Cir. 1986), the court awarded fees after concluding that the "company had no ground for challenging the [arbitrator's] decision in court; also, it filed this suit after the statute of limitations had run." The Eighth Circuit awarded attorney fees in *UAW v. United Farm Tools Inc.,* 762 F.2d 76 (1985), because the court concluded that since United Farm did not even act to have the award set aside when the UAW brought an action to enforce the award, United Farm unjustifiably refused to comply with the award. Monroe did not act with such lack of justification. Monroe has contended from the beginning that the award did not draw its essence from the contract and its position clearly has an arguable basis in law. It cannot be said that the suit was brought "in bad faith to harass rather than to win." *Chrysler Motors v. International Union,* 959 F.2d 685, 689 (7th Cir. 1992), *cert. denied*, 1992 WL 171385 (U.S., Oct. 5, 1992). Finding no basis for a determination of bad faith, we reverse the award of attorney fees.

The judgment of the district court is affirmed in part and reversed in part. The award of the arbitrator is enforced. No costs are allowed on appeal; each party will bear its own costs.

DAVID A. NELSON, Circuit Judge, dissenting. Although the employer's work rules did authorize termination of employment for *off-the-job* use of illegal drugs where such use could adversely affect the employee's job performance, it is undisputed that David

Rafko was discharged because of drugs found in his system at a time when he was *on the job*. In the circumstances presented here, I believe, the effect of off-duty drug usage on job performance is simply irrelevant.

A laboratory test of a urine specimen furnished by Mr. Rafko during working hours showed a marijuana metabolite concentration of 242 nanograms per milliliter. In the professional opinion of the employer's highly qualified expert—an opinion that stands totally uncontradicted—this scientifically valid test established that Mr. Rafko was "under the influence" of marijuana while on company property and on company time.

The work rule that controls in such a situation is unambiguous. "Employee[s] will be subject to discharge," it says, for "[b]eing under the influence of alcohol or drugs on Company property or on Company time." Standard Practice Instruction IV, § 17, Part I F, effective November 12, 1987. The rule provides elsewhere that "[a] determination of 'influence' may be established by a professional opinion, a scientifically valid test, and, in certain cases, such as alcohol, by a layperson's opinion."

The arbitrator had no authority to amend the rule to say that an employee who has been shown—by an uncontested professional opinion based on a scientifically valid test—to be under the influence of illegal drugs while on company time is not subject to discharge without proof that the drugs could or did interfere with his job performance. Yet that is precisely what the arbitrator did, it seems to me; he added a "job performance" proviso that he was not entitled to add.

In so doing, I believe, the arbitrator refused to apply an explicit term of the work rules as written. Because the arbitrator's award thus fails to derive its essence from the agreement, it ought not to have been enforced. I am strengthened in this conclusion by the fact that the brand of industrial justice dispensed by the arbitrator is out of harmony, to say the least, with the well-defined public policy reflected in the nation's drug laws.

United States District Court

EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MONROE AUTO EQUIPMENT COMPANY, *Plaintiff,* *v.* INTERNATIONAL UNION, UNITED AUTOMOTIVE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS AND AMERICA (UAW), MONROE AUTO EQUIPMENT COMPANY, A UNIT OF LOCAL 878, *Defendant.*	CASE NO. 91-70854 HONORABLE PAUL V. GADOLA

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This action was filed February 25, 1991 by plaintiff Monroe Auto Equipment Company ("Monroe") against defendant International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), Monroe Auto Equipment Company, a Unit of Local Union 878 ("UAW"). Monroe seeks to vacate and set aside an arbitration award rendered under the collective bargaining agreement between the parties. On March 20, 1991, defendant filed its answer and a counterclaim to enforce the arbitrator's award. Monroe filed its motion for summary judgment and its motion to dismiss defendant's counterclaim September 16, 1991. Defendant filed its motion for summary judgment September 27, 1991. Responses and replies have been received by the court.

FACTS

Monroe is the manufacturer of shock absorbers and struts for cars and trucks. It is a party to a collective bargaining agreement ("Agreement") with defendant UAW. David Rafko was a Monroe mechanic represented by defendant. Rafko installed experimental ride control products on cars. These cars were then taken out and driven at speeds often exceeding 50 m.p.h. on public highways. Rafko also at times drove test cars, his own vehicle and operated power tools and equipment. The bulk of Rafko's time was spent underneath cars installing new test products, such as struts, that were not yet available on the market.

In January 1986, Monroe adopted a drug program which offered employees counseling and rehabilitation.[1] This program stated that employees were subject to discharge for "being under the influence of alcohol or drugs on Company property or on Company time" and for "selling or using alcohol or drugs on Company property or on Company time." The program further stated that Monroe "maintains the right to require any employee to take medically approved tests to determine if the employee is under the influence or has been using alcohol or illegal drugs." The program was revised in 1987 to state that "under the influence" would be established by "a professional opinion" or a "scientifically valid test."[2] The revised program also indicated that

> Off-The-Job, Illegal Drug Use which could adversely affect an employee's job performance or which could jeopardize the safety of other employees, the public, or company equipment is proper cause for administrative or disciplinary action up to and including termination of employment.

In 1989, Monroe adopted the following policy:

> [I]t is the policy of the Company to take immediate disciplinary action, up to and including discharge, of any em-

[1]Plaintiff's Br. Ex. 2.

[2]Plaintiff's Br. Ex. 3.

> ployee who engages in the use or possession of illegal drugs or the use of alcohol in the workplace. This also includes being "under the influence" of any illegal drugs or alcohol used prior to reporting to the workplace.[3]

Monroe's plant rules provide that

> These acts or practices are expressly prohibited on company property. Any infraction will subject the offending employee to discharge, suspension, or a written or oral reprimand. . . . (6) Possession, consumption, or under the influence of intoxicating beverages, and/or controlled substances while on company property.[4]

In August 1989, Monroe received an anonymous letter stating that Rafko and another employee were trafficking in illegal drugs at work.[5] Employee interviews and other investigations ensued. A Monroe investigator interviewed Rafko, the latter stating that he did not sell or give away any drugs on company property, but admitting that he used marijuana the weekend before the interview. Rafko then signed a drug-testing consent form.

On October 5, 1989, Rafko's urine specimen was positive for carboxy THC, a metabolite of marijuana, at a level of 242 ng/ml. One expert at the arbitration hearing testified that a carboxy THC level of 60-100 ng/ml is "generally accepted as impairing performance."[6] Rafko was terminated for testing positive for illegal drug use and for being under the influence of drugs in violation of Monroe's work rules and policies.

Rafko and the UAW filed a grievance. At the ensuing arbitration, the UAW stipulated that Rafko's drug tests were accurate.[7] The arbitrator also found that Monroe was told that the level of marijuana for which Rafko tested positive "constituted being un-

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[3]Plaintiff's Br. Ex. 4.

[4]Plaintiff's Br. Ex. 9.

[5]Plaintiff's Br. Ex. 5.

[6]Arbitration Tr. at 109, 111 (testimony of Dr. James Hayden).

[7]Arbitration Opinion and Award at 8 n. 2 (Dec. 22, 1990) ("Award").

der the influence of marijuana. This was on the basis of standards set by the National Institute on Drug Abuse, a government agency."[8] The Award acknowledges Rafko's admission that he had smoked two cigarettes of marijuana late the night before he was tested,[9] but it did not reflect Rafko's testimony that "[i]f someone [a co-worker] wanted one [a marijuana joint], I'd give them one."[10]

While agreeing that there was a possibility that Rafko was functioning "at less than optimum level," the arbitrator held that Monroe did not have just cause to terminate Rafko because there are no established legal standards for determining if someone is under the influence of marijuana.[11] "[I]llegal drug use, reprehensible though it is, does not in itself justify discharge."[12] Additionally, the arbitrator stated that an employer's right to discipline is confined to "work-related matters."[13] However, he stated that this rule of thumb does not apply when an employee's "off-duty or off-workplace behavior affects the business or operation."[14]

The arbitrator noted that Monroe officials and supervisors had "never noted unsatisfactory performance or other behavior that indicated that [Rafko] had been under the influence of drugs."[15] Further, the arbitrator noted that there had been no indication of "abnormal behavior on October 5, 1989," the date of Rafko's urine test.[16] Finally, the arbitrator stated that there was no outward appearance that Rafko was "under the influence of drugs" the day of his test.[17]

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[8] *Id.* at 7-8.

[9] *Id.* at 13.

[10] Arbitration Tr. at 493-94 (Plaintiff's Br. Ex. 8).

[11] Award, *supra* note 7, at 25-26.

[12] *Id.* at 24.

[13] *Id.* at 23.

[14] *Id.*

[15] *Id.* at 8.

[16] *Id.* at 26.

[17] *Id.* at 10.

The Award required that David Rafko be reinstated and that the matter of penalties and compensation be remanded to the parties for consideration. Monroe has refused both to reinstate Rafko and to discuss compensation and penalties. Rather, Monroe filed this suit to overturn the Award.

STANDARD OF REVIEW

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment may be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." "A fact is 'material' and precludes grant of summary judgment if proof of that fact would have [the] effect of establishing or refuting one of the essential elements of the cause of action or defense asserted by the parties, and would necessarily affect [the] application of appropriate principle[s] of law to the rights and obligations of the parties. (Citation omitted.) *Kendall v. Hoover Co.*, 751 F.2d 171, 174 (6th Cir. 1984) (quoting Black's Law Dictionary 881 (6th ed. 1979)). The Court must view the evidence in a light most favorable to the nonmovant as well as draw all reasonable inferences in the nonmovant's favor. *See United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); *Bender v. Southland Corp.*, 749 F.2d 1205, 1210-11 (6th Cir. 1984).

The movant bears the burden of demonstrating the absence of all genuine issues of material fact. *See Gregg v. Allen-Bradley Co.*, 801 F.2d 859, 861 (6th Cir. 1986). The initial burden on the movant is not as formidable as some decisions have indicated. The moving party need not produce evidence showing the absence of a genuine issue of material fact; rather, "the burden on the moving party may be discharged by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once the moving party discharges that

burden, the burden shifts to the nonmoving party to set forth specific facts showing a genuine triable issue. Fed. R. Civ. P. 56(e); *Gregg,* 801 F.2d at 861.

To create a genuine issue of material fact, however, the nonmovant must do more than present some evidence on a disputed issue. As the United States Supreme Court stated in *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249-50 (1986).

> There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the [nonmovant's] evidence is merely colorable, or is not significantly probative, summary judgment may be granted.

(Citations omitted); *See Catrett,* 477 U.S. at 322-23; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586-87 (1986). The standard for summary judgment mirrors the standard for a directed verdict under Fed. R. Civ. P. 50(a). *Anderson,* 477 U.S. at 250. Consequently, a nonmovant must do more than raise some doubt as to the existence of a fact; the nonmovant must produce evidence that would be sufficient to require submission to the jury of the dispute over the fact.

APPLICABLE LAW

When an arbitration award has been rendered pursuant to a collective bargaining agreement, the judicial scope of review of that award is extremely limited. As the arbitrator was part of the package bargained for in negotiations, the parties "should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for." *United Steelworkers of Am. v. American Mfg. Co.,* 363 U.S. 564, 568 (1960).

> The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The Federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards.

United Steelworkers of Am. v. Enterprise Wheel and Car Corp., 363 U.S. 593, 596 (1960).

> Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept. . . . The arbitrator may not ignore the plain language of the contract: but the parties having authorized the arbitrator to give meaning to the language of the agreement, a court should not reject an award on the ground that the arbitrator misread the contract. . . . [A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.

United Paper Workers Int'l Union v. Misco, Inc., 484 U.S. 29, 37-38 (1987) (citations omitted). Further, a court may not overturn an arbitrator's award on public policy grounds unless the arbitrator's interpretation of the collective bargaining agreement would violate "some explicit public policy" that is "well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.' " *Id.* at 43 (quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945)). Ultimately, "the question of public policy is . . . one for resolution by the courts." *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 766 (1983).

ANALYSIS

The issues presented in these cross-motions for summary judgment are whether the arbitrator's award may be overturned because (1) the award fails to draw its essence from the Agreement or (2) the award violates some explicit public policy. These issues will each be addressed in turn.

First, an award fails to draw its essence from a collective bargaining agreement when (a) it conflicts with its express terms, (b) imposes requirements not expressly provided in the agreement,

(c) is without rational support in the agreement or (d) is based on general considerations of fairness and equity instead of the precise terms of the agreement. *Vic Wertz Distrib. v. Teamsters Local 1038,* 898 F.2d 1136, 1141 (6th Cir. 1990). Once again, a "serious error" in interpretation of the collective bargaining agreement will not be sufficient grounds upon which to overturn an arbitrator's award. *Misco,* 484 U.S. at 38. Even "improvident" or "silly" interpretations are not sufficient grounds on which to overturn an award. *Id.* at 39. From the latest Supreme Court opinion, fraud or dishonesty must be pleaded unless the interpretation has no basis. *Id.* at 38-39.

In this case, the arbitrator has reached an arguable decision on the interpretation of the Agreement. The arbitrator has stated that, because "there are no clearly established standards for determining the degree of being under the influence of the drug," Monroe cannot discharge an employee for failing a drug test.[18] This is tantamount to finding that the program, promulgated under the Agreement, is too vague in its terms to enforce. In fact, the Arbitrator indicated a comparison to blood alcohol levels in the opinion. This court reads these passages as stating that, until there is a precise definition of "under the influence of drugs" under the program or the Agreement, the drug program will not be enforced. In order for Monroe to set up and enforce a company-wide drug testing program, the program must spell out the definition of "under the influence of drugs."[19]

This interpretation does not conflict with the Agreement's express terms. It merely states that the express terms are too vague to enforce. This interpretation does not impose requirements not

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[18]Award, *supra* note 7, at 25.

[19]This could possibly be done by defining "under the influence of drugs" as "having a blood carboxy THC level of 60 ng/ml or a blood THC level of 1 ng/ml" as stated by Dr. Hayden. *Cf. Georgia Power Co. v. IBEW, Local 84,* 707 F. Supp. 531 (N.D. Ga. 1989), *aff'd,* 896 F.2d 507 (11th Cir. 1990) (employer drug program defining "under the influence of marijuana" as 75 ng/ml of carboxy THC).

expressly provided in the Agreement, as nothing is added to the Agreement. The Arbitrator's interpretation is not without rational support.

Finally, the interpretation is not based on general considerations of fairness and equity. In fact, the interpretation is based upon a specific tenet of contract law: vague and amorphous language will not be given effect unless both parties agree to its meaning. *See, e.g., Banque de Depots v. National Bank of Detroit,* 491 F.2d 753, 756 (6th Cir. 1974) (citing cases); *see also In re Pierson's Estate,* 282 Mich. 411 (1937); *Vanderhoef v. Parker Bros., Co.,* 267 Mich. 672 (1934).

The case cited by plaintiff, *Dobbs, Inc. v. Local 614, Int'l Bhd. of Teamsters,* 813 F.2d 85 (6th Cir. 1987), is distinguishable. In *Dobbs,* the court was confronted with an arbitrator's award that totally overlooked and dismissed part of the collective bargaining agreement. "At no point in his award did the arbitrator refer to Article 29 of the agreement, which recognizes and confirms the company's right to 'discipline and to enforce working rules. . . .' " *Id.* at 88. The arbitrator's award went on to impose a limit on the exercise of that right held by the company under Article 29. *Id.* The arbitrator's award in the instant case does not read out of the Agreement any bargained-for provision. The Award does state that the work rule promulgated under the Agreement is too vague to enforce. Further, *Dobbs* was decided before *Misco* and *Interstate Brands v. Chauffeurs, Teamsters Local 135,* 909 F.2d 885, 893 (6th Cir. 1990), *cert. denied,* 111 S. Ct. 1104 (1991). It is doubtful that *Dobbs* survived either decision, as both subsequent decisions give much more deference to the arbitral award in its interpretation of the collective bargaining agreement.

Because this interpretation is arguably sound and draws it essence from the Agreement, this court will not disturb the Award on this ground.

Second, a court may overturn an arbitrator's award on public policy grounds if that public policy is "explicit" and is "well

defined and dominant," *W.R. Grace,* 461 U.S. at 766. The "well defined and dominant" standard requires "reference to the laws and legal precedents." *Muschany,* 324 U.S. at 66. Courts must be careful to determine

> not whether grievant's conduct for which he was disciplined violated some public policy or law, but rather whether the award requiring the reinstatement of a grievance, i.e., "the contract as interpreted," . . . violated some explicit public policy.

Interstate Brands, 909 F.2d at 893 (quoting *W.R. Grace,* 461 U.S. at 766).

> [T]he review given an arbitration award when it is challenged on public policy grounds is not *de novo*. . . . An arbitration award is not to be based on public policy considerations, since public policy questions are for the court, not the arbitrator.

Board of County Comm'rs of Lawrence County v. L. Robert Kimball and Assocs., 860 F.2d 683, 686 (6th Cir. 1988), *cert. denied,* 110 S. Ct. 1480 (1990); *but cf. Iowa Elec. Light and Power v. Local Union 240,* 834 F.2d 1424 (8th Cir. 1987).

Plaintiff has not shown this court authority that refers to reinstating an off-site marijuana user whose job includes driving, repairing or assembling automobiles. *Iowa Electric* involved a nuclear power plant employee who blatantly disregarded on-site mechanical safety regulations. Here, Rafko did not violate any on-site mechanical safety regulations. In *Delta Air Lines v. Air Line Pilots Ass'n Int'l,* 861 F.2d 665 (11th Cir. 1988), *cert. denied,* 110 S.Ct. 201 (1989), the employee was a pilot whose termination for flying while drunk was overturned by the arbitrator. The Eleventh Circuit vacated the award, reasoning that operating an airplane while intoxicated violated public policy. Here, however, there was no finding that Rafko was intoxicated or impaired. The only finding made by the arbitrator was that Rafko had used marijuana off Monroe's premises.

The Michigan case of *Russell Memorial Hosp. v. United Steelworkers,* 720 F. Supp. 583 (E.D. Mich. 1989), is also not on point.

There a nurse was discharged for failing to give a patient prescribed medication. The arbitrator held that such a violation did not constitute just case. Judge Churchill disagreed and overturned the arbitrator's award, citing various Michigan statutes evidencing a public policy of safe and competent nursing. The same scenario does not occur in the instant case. There has been no on-site violation of procedure by Rafko found by the arbitrator. Rafko's off-site drug use was not found to affect his capabilities on the job.

Lastly, *Georgia Power Co. v. IBEW, Local 84,* 707 F. Supp. 531 (N.D. Ga. 1989), *aff'd,* 896 F.2d 507 (11th Cir. 1990), is not on point. In that case, the employer had a well defined policy against drug use clearly stating that "75 ng/ml" of carboxy THC constituted "under the influence of marijuana." The grievant was tested on-site, and the results showed there were over 300 ng/ml of carboxy THC in his system. The arbitrator in that case found that the grievant was "probably" under the influence of marijuana on the job. Even considering all of this information, the arbitrator held there was insufficient cause to terminate the grievant. The district court reversed and held that the award violated public policy, stating that the grievant's employment and on-the-job intoxication together constituted the offensive conduct.

In the instant case, the arbitrator did not find a set definition of "under the influence of marijuana" as in *Georgia Power.* Further, the arbitrator did not find that Rafko was impaired or intoxicated while performing his duties. This court is bound by the factual determinations of the arbitrator when revisiting an award on appeal. *Misco,* 484 U.S. at 38. Additional fact finding by this court has been held impermissible. *Interstate Brands,* 909 F.2d at 894. The arbitrator's fact finding abilities may be silly, improvident and suspect, but they are not the product of fraud or dishonesty. *Misco,* 484 U.S. at 38-39.

There is authority that points in the opposite direction, mandating that arbitrators' awards be upheld even in the face of

work-related substance abuse. In *Dixie Warehouse and Cartage v. General Drivers Local 89,* 898 F.2d 507 (6th Cir. 1990), the arbitrator found that the grievant had drunk beer while on duty. The arbitrator overturned the grievant's termination, however, because the employer based the termination on drunkenness *and* being A.W.O.L. As there was no merit to the A.W.O.L. charge, and the grounds were not stated to be alternative, the arbitrator reasoned that it was unclear whether the grievant would have been discharged for on-duty drunkenness alone. The district court upheld the arbitrator's award, and the Sixth Circuit affirmed. In so affirming, the court found no violation of public policy, and stated that the arbitrator's fact finding and reading of the collective bargaining agreement were not "improvident." *Id.* at 511 (citing *Misco,* 484 U.S. at 39).

Further, in *Interstate Brands,* the grievant was discharged for off-duty drug use. The grievant in that case was a delivery man who operated a 20-foot step van on the public highways. The arbitrator found that the grievant did use drugs off-duty but that this was not "just cause" as was contained in the collective bargaining agreement. The district court overturned the award, citing public policy grounds as its main reason.

The Sixth Circuit reversed. In so reversing, the court stated that the district court and the plaintiff provided no law or legal precedents that indicated a "well defined and dominant" public policy had been violated by the award. *Interstate Brands,* 909 F.2d at 893. Further, the court found that the district court "engaged in impermissible fact finding" and therefore it had overstepped its authority. *Id.* at 894.

The same problems appear in the instant case. The lack of legal authority tendered by Monroe is troubling. As the Sixth Circuit has stated:

> The [plaintiff] failed to identify any law or legal precedent with which that arbitrator's reinstatement order would conflict. While it is indisputable that allowing intoxicated persons to drive motor vehicles violates public policy, it does not follow,

> however, that any arbitration award reinstating an employee discharged for being intoxicated while off-duty, or arrested for off-duty possession of controlled substances may never be enforced without violating the public policy exception of arbitration.

Interstate Brands, 909 F.2d at 893. Because of the dearth of "well defined and dominant" legal precedents concerning public policy, this court must uphold the arbitrator's award. *Id.* Further, this court will not engage in gratuitous fact finding explicitly prohibited in this circuit.

In conclusion, were this case to be decided *de novo* by this court, the outcome may have been different. However, the parties have contracted to have arbitrators settle their disputes in order to avoid the delays and bureaucracy of the courts. Because an arbitrator has heard this case and rendered a detailed opinion and award, this court is bound by the Award's facts and interpretations. To reconsider and revisit the matter would in effect nullify the collective bargaining agreement and render the arbitral system meaningless.

ORDER

For the foregoing reasons, it is hereby ORDERED that defendant's Motion for Summary Judgment be GRANTED and that the Arbitrator's Award be ENFORCED and given full effect.

It is further ORDERED that plaintiff's Motion for Summary Judgment be DENIED.

It is further ORDERED that plaintiff's Motion to Dismiss Defendant's Counterclaim be DENIED.

It is further ORDERED that the complaint be DISMISSED with prejudice.

SO ORDERED.
Dated: Nov. 25, 1991

PAUL V. GADOLA

PAUL V. GADOLA
United States District Judge

OPINION AND AWARD

In the Matter of MONROE AUTO EQUIPMENT COMPANY, Monroe, Michigan *and* UAW, LOCAL 878, Monroe, Michigan	Federal Mediation and Conciliation Service Case No. 90-03175 Grievance No. 181020 DAVID RAFKO—Discharge

APPEARANCES

Company

CARL JOHNSON, Attorney
JOELLEN S. SULLIVAN, Manager—Employment Practices and Personnel
GREG RIPPBERGER, Manager—Compensation and Benefits
JOHN R. WILLIAMS, Supervisor
KAREN L. STRABL, Personnel Services Coordinator
KAY M. OSGOOD, Supervisor—Personnel Services
ELI P. RIVERA, Investigator—Tenneco, Inc.
JAMES W. HAYDEN, M.D., Witness
JAKE BOWLES, Witness

Union

FRANK WHITE, President—Local 878
JESSE GREGORY, International Representative
GERALD MANSFIELD, Vice-President—Local 878
ROBERT VARNES, Recording Secretary—Local 878
ROBIN HERTZSCH, Member—Bargaining Committee
DON COPI, Skilled Trades Committeeman
DAVID RAFKO, Grievant
GARY PRATHER, Witness
GARY CORNOYER, Witness

ISSUES

The jointly stipulated issues in this case are:

1. Did the Company violate Section 8(a)(5) of the National Labor Relations Act in:

   (a) refusing to bargain and provide information regarding drug testing policies and related discipline since early August, 1989; and

   (b) refusing to provide the Union with the results of the drug test in the case of David Rafko?

2. Did the Company interfere with David Rafko's 8(a)(1) National Labor Relations Act rights in refusing to allow the president of the local union or a member of the bargaining committee to represent him on October 5, 1989?

3. Was David Rafko suspended with pay on October 5, 1989, and then discharged for "just cause" effective October 12, 1989? If the Company acted improperly as to the above, what shall the remedies be?

FACTS OF THE CASE

On October 5, 1989, David Rafko and other employees were suspended pending the results of tests of their urine samples. On October 12, Rafko and two other employees were terminated, apparently for the violation of Company Work Rules. On the same day the Local Union filed a grievance on behalf of David Rafko, "The Union protests the unjust discharge of the aggrieved employee." The grievance was amended thereafter to deny the applicability of any Company Work Rule and the method used by the Company to terminate Rafko.

On October 26, 1989, the Union filed charges with the National Labor Relations Board alleging that the Company had violated Sections 8(a)(1), (3), and (5) of the National Labor Relations Act in advising Rafko that he had to use the vice-president of the local union instead of other union officials to represent him, in its

handling of his drug testing and related discipline, and in its response to the Union's requests for information. The case, which was docketed as NLRB Case No. 7-CA-29839, was deferred to arbitration. Arbitration hearings ensued on March 14, April 14, August 9, and October 2, 1990, and the case was closed with post-hearing briefs.

Compensation and Benefits Manager Greg Rippberger explained that the instant termination was based on well established Company policies. Thus, on August 1, 1985, Rippberger prepared an Alcohol and Drug Abuse Program policy statement, applicable to all employees, including those in the bargaining unit, that included the following:

"I. POLICY

* * *

"F. Employee will be subject to discharge for:

1) Continuing unsatisfactory job performance.

2) Failing to respond or cooperate with the EAP alcohol or drug rehabilitation services;

3) Being under the influence of alcohol or drugs on Company property or on Company time;

4) Selling or using alcohol or drugs on Company property or on company time; and/or

5) Conviction of drug related crime."

On November 2, 1987, the Company issued a revision of the Program, which included the above language and in addition added the following:

"G. SEARCHES AND SCREENINGS

"1) Searches—The Company may conduct unannounced personal or property searches for illegal drugs or alcohol on Company premises. Employees are expected to cooperate in the conduct of such searches.

Searches may be conducted at any time, whether or not illegal drugs or alcohol are expected to be found.

"2) Drug and Alcohol Screening—The Company may require a blood test, urinalysis, or other drug/alcohol screening of persons suspected of using or being under the influence of a drug or alcohol or when workplace conditions or circumstances warrant it, this includes all workplace accidents.

"H. Off-The-Job, Illegal Drug Use—Off-The-Job, Illegal Drug Use which could adversely affect an employee's job performance or which could jeopardize the safety of other employees, the public, or company equipment is proper cause for administrative or disciplinary action up to and including termination of employment. Employees who are arrested for off-the job drug activity may be considered to be in violation of this policy. In deciding what action to take, management will take into consideration the nature of the charges, the employee's present job assignment, the employee's record with the Company and other factors relative to the impact of the employees arrest upon the conduct of company business."

The testimony was that the above documents were distributed to all employees including those in the bargaining unit. In addition, in September, 1988, subsequent to the adoption of the current collective bargaining agreement, the Company promulgated Work Rules which included the following:

"The following list of work rules has been developed to provide for the protection of Monroe Auto Equipment Company employees, its machinery, and property. These acts or practices are expressly prohibited on company property. Any infraction will subject the offending employee to discharge, suspension, or a written or oral reprimand.

* * *

"6. Possession, consumption, or under the influence of intoxicating beverages, and/or controlled substances while on company property."

> "7. Failure to report the use of prescription drugs, or non-prescription drugs to the foreman or supervisor prior to the beginning of the work shift."

On May 17, 1989, the Company promulgated a Corporate Policy Statement on a Drug-Free Workplace which included the following:

> "Monroe Auto Equipment Company has a vital interest in maintaining a safe, healthful, and productive work environment in order to protect our employees, property, safety, and efficiency of operations. Therefore, it is the policy of the Company to take immediate disciplinary action, up to and including discharge, of any employee who engages in the use or possession of illegal drugs or the use of alcohol in the workplace. This also includes being "under the influence" of any illegal drug or alcohol used prior to reporting to the workplace."

There was no evidence that the Union requested bargaining regarding the above Company policies subsequent to the distribution of the involved documents.

Turning to the facts immediately bearing on this case, Manager Rippberger presented a letter he received in August of 1989, signed only as "Concerned Employee." The letter stated that there was "drug trafficing (sic) that is taking place here at Monroe Auto Equipment," and that Dave Rafko was one of two employees "dealing right out of the garage."[1]

Management decided that the matter should be pursued, and Greg Rippberger approached a "trusted" employee, whom he did not name in his testimony. The employee gave Rippberger a list of employees, which included the Grievant, who were allegedly involved in the sale and use of drugs on Company property. The employee told Rippberger that David Rafko was not only a user but a drug dealer. At that point, local management decided to call Security at Tenneco corporate headquarters.

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[1]The other employee named in the letter was among those subsequently terminated.

The result was the arrival of Eli Rivera, who is Senior Investigator for Tenneco, and handles security issues at the various Tenneco properties. Rivera began to interview employees, including the employee who had told Rippberger about the Grievant's involvement in drugs. Rivera stated that he spoke to three Monroe Auto Equipment employees on a confidential basis. Rivera testified that the three employees, who could not be identified for security reasons, stated that they had bought drugs from Rafko. Rivera advised Manager Rippberger of the results of his investigation.

Rippberger stated that management then concluded that Rafko and other employees had violated Company policy and it was decided to interview and subject them to drug screening tests. On October 5, 1989, the implicated employees' supervisors were directed to bring them to the to the Human Resources Department offices, where each employee was placed in a separate room. Thereafter, each employee was directed to meet with Investigator Rivera.

Greg Rippberger stated that he was called while the Grievant was meeting the Investigator and advised that Rafko wanted Union representation. Rippberger called Local Union Vice-President Gerald Mansfield and asked him to serve as Rafko's Union representative. Shortly thereafter, Mansfield entered the room.

The testimony was that Rivera stated that the Grievant had admitted using drugs, but insisted that such use was confined to weekends. Rippberger stated that he heard the Grievant confirm use of drugs, but that he insisted that such use had nothing to do with the workplace. Rippberger heard Rivera state that the Grievant had consented to a drug test. During the discussion Local Union Vice-President Mansfield made no comment.

Arrangements were made for Rafko to go to Frenchtown Medical Center where a urine sample would be taken. After providing the sample, the Grievant returned to the plant and was told that he was suspended with pay pending the results of the drug test.

Manager Rippberger explained that the Grievant's treatment was the same as that of other suspected employees.

On October 10, the results of the test, performed by Roche Biomedical Laboratories, were received and the finding for cannabinoid was positive. The test showed over 200 ng/ml, which according to advice given to management constituted being under the influence of marijuana.[2] This was on the basis of standards set by the National Institute on Drug Abuse, a government agency. Accordingly, the Grievant was discharged effective October 12, 1989.

On cross-examination, Rippberger conceded that members of management had never noted unsatisfactory performance or other behavior that indicated that the Grievant had been under the influence of drugs. Nor had Rafko either requested or been referred to drug rehabilitation. Nevertheless, management felt that the Grievant had come to work under the influence of marijuana and also believed that he was a drug seller. This was on the basis of Rivera's investigation and other reports received from employees management declined to identify.

Rippberger's description of the event was supported by Corporate Senior Investigator Eli Rivera, who also provided additional detail. Rivera, who had retired from the Houston Police Department with the rank of Lieutenant, had long experience in narcotics investigations. At management's request, Rivera came to Monroe to determine the extent of drug dealing and use at the plant.

Rivera testified that after he assured three employees that their interviews would be confidential, they told him that they had bought drugs from David Rafko. On October 5, at approximately 1:30 p.m., Rivera interviewed Rafko and explained the

[2]The Union did not dispute the positive finding in the sample or the reading reported by the laboratory.

Company's concern about drug use at the plant and advised him that an anonymous letter had been received implicating him in drug sales. When the Grievant requested Union representation, Rivera suspended the interview and reported the request to Greg Rippberger.

Shortly thereafter, Local Union Vice-President Mansfield arrived and Rivera explained the situation to him. At that point Rivera asked Rafko whether he had sold or given narcotics to anybody, and the response was negative. The Investigator then asked the Grievant whether he uses narcotics, and the testimony was that Rafko stated that he had experimented with marijuana over the weekend. Rivera asked Rafko whether he would submit to a drug test and Rafko consented. Thereafter the Grievant and other involved employees were transported to a clinic for a drug screening test.

In his continued testimony, the Investigator stated that subsequently still another person told him that he had done drugs with Rafko. When asked whether he would testify to such occurrence, the person declined because he was concerned that he might suffer bodily harm. On cross-examination, Rivera conceded that he could not tell whether Rafko was under the influence of drugs on October 5. Also conceded was that the Grievant signed the consent form for the drug test after he was told that he would be terminated if he did not consent.

John Williams, who supervised the Grievant for over a year preceding his termination, described Rafko as a good worker, who was, however, occasionally disorganized and did not get his work done on time. Thus, the Grievant worked on test cars in the garage and the work he completed was satisfactory. In fact, the Grievant's work had to be of high quality, since the cars were used to test Company parts and were driven over a test track up to 50 miles per hour.

On October 5, 1989, pursuant to orders, Williams brought Rafko to the Human Resources offices. Williams stated that at

that time, the Grievant did not ask for Union representation. On cross-examination, the Supervisor testified that the Grievant was performing his job properly that day and did not appear to be under the influence of drugs.

Testifying for the Company, James Hayden, M.D. and Ph.D., explained that in addition practicing emergency medicine, he has acted as a consultant in drugs and toxicology matters in various industries. He has been certified by the American Society of Addiction Medicine, and has reviewed and evaluated over 10,000 drug tests.

Dr. Hayden pointed out that marijuana acts as a mild hallucinogen and sedative with effects somewhat similar to alcohol. The use of marijuana can lead to gross intoxication and the effects can include loss of judgment, inhibition, time perception, and motor coordination. However, there is no legal definition or standard for being under the influence of marijuana, as in the case of being under the influence of alcohol.

Dr. Hayden went on to state, however, that what is "being talked about right now" is that between 60 and 100 ng/ml of THC in the urine would indicate being under the influence of marijuana. But Hayden conceded that because of the difficulties involved, to date there have been no studies that specifically link degree of impairment with marijuana use. There is also the problem of the difference between a person "being under the influence" of the drug and being "impaired" by same—there appeared to be no studies that clearly distinguish these concepts.

Dr. Hayden referred to an article, "Carry-Over Effects of Marijuana Intoxication on Aircraft Pilot Performance: A Preliminary Report," Jerome A. Yesavage, M.D., Von Otto Leirer, Ph.D., Lt. Cdr. Mark Denari, and Leo E. Hollister, M.D., which appeared in the *American Journal of Psychiatry,* 142:11, November 1985, at pages 1325-1329. The summary of the article was as follows:

"Ten experienced licensed private pilots were trained for 8 hours on a flight simulator landing task. They each smoked a cigarette containing 19 mg of a 9-tetrahydrocannabinol (THC), and 24 hours later their mean performance on the flight task showed trends toward impairment on all variables, with significant impairment in number and size of aileron changes, size of elevator changes, distance off center on landing, and vertical and lateral deviation on approach to landing. Despite these deficits, the pilots reported no awareness of impaired performance. These results may have implications for performance of complex tasks the day after smoking marijuana."

Also referred to by Dr. Hayden was, "Feasibility of Chemical Testing for Drug-Impaired Performance," by Jean Barnett and Robert E. Willette, appearing as Chapter 7 in *Advances in Analytical Toxicology—Volume 2,* Randall C. Baselt, Ph.D., Yearbook Medical Publishers, Inc. 1989. The authors reviewed various studies involving the absorption, metabolism, excretion, and impairing effects of marijuana use. They stated that their review of the data, "suggests a cutoff of around 60 ng/ml for detecting marijuana use within the 8-9 hour time frame for impairment." They also went on to state that, "The use of a high cutoff, such as concentrations of 80-100 ng/ml, would give a 67-86% probability of predicting the 8 hour time frame," but that such a higher cutoff would exclude most of the specimens that are taken "within 8 hours after smoking a 2.8% marijuana cigarette." Dr. Hayden was not aware of any study that refuted the observations made in the two above articles.

Turning to the present case, Dr. Hayden noted that the laboratory had found an exact result of 242 ng/ml of Carboxy-THC in the Grievant's specimen. This was far higher than the cutoff suggested above. It was Dr. Hayden's view that the level found indicated either heavy steady use of marijuana, or probable use within 24 hours. A likely possibility was the smoking of as many as two joints within 8 hours of taking the specimen. Accordingly, Dr. Hayden believed that the Grievant was "under the influence" of marijuana at the time he was tested.

Grievant David Rafko, who was hired in 1979, stated that on October 5, 1989, he was aware that Local Union President Frank White had been called into Supervisor Williams's office. Thereafter, as he was on his way to the executive garage, Williams called him and said that they had to go to Human Resources. The Grievant stated that he did not understand what was going on.

As Rafko was directed to one of the offices, he saw Local Union Vice-President Gerald Mansfield for a few seconds and was then directed to another office where Manager Rippberger introduced him to Investigator Eli Rivera. The Investigator told him that a substance abuse problem was being investigated, and that the Company had received an anonymous letter implicating him. Rivera then asked whether Rafko had used crack, marijuana, or other drugs.

Rafko denied using anything other than marijuana, which he conceded he had used the prior weekend. The Grievant then admitted that he had smoked two or three joints the evening before. He denied using the substance on October 5, or ever on Company property. He also denied having a "substance abuse" problem. Nevertheless, on October 12, Manager Rippberger called the Grievant to tell him that he had been terminated because he had tested positive.

Rafko provided detail about his work as a mechanic. He stated that his work consisted of repairing and maintaining vehicles and particularly removing wheels and working on shock absorbers. He pointed out that there had never been an accident on any vehicle he had worked on. The Grievant also stated that he had never been involved in any serious accident at the plant, nor did he have attendance problems or fights with co-workers.

In his continued testimony, Rafko conceded signing a form consenting to his being tested for the use of drugs and the release of the test results. The form stated that pursuant to "SPI IV-17," the Company could "require drug testing of persons suspected of

using illegal drugs." The form also stated that the Company had "a reasonable belief you may be an illegal drug user," and that, "if you do not consent to drug testing, you will be terminated." Under the circumstances, Rafko signed and underwent testing.

The Grievant conceded that following his use of marijuana, he tended to become tired. His termination caused him to have insight that the use of the drug was bad for his health and had led to the loss of his job. As a result, he entered a treatment program and has learned to keep away from the "bar scene" and spend time with his family. He now has more energy, feels good, and has been tested recently and shown negative for drug use.

The Union called several Local Union officers to provide background and detail directly connected with the processing of this case. Thus, Gary Prather who held Union office for the last eight years denied receiving the Company's Alcohol and Drug Abuse Program policy statements. Bargaining Committee Member Gary Cornoyer, while conceding that he received a copy of the Company's Work Rules when hired, also denied seeing the Alcohol and Drug Abuse documents. Local Union Recording Secretary Robert Varnes testified that he first became aware of the Company's Alcohol and Drug Abuse Program documents when management decided to terminate David Rafko on October 12, 1989.

Company witnesses, however, in person and by affidavit, testified convincingly that the policies had been sent to "all employees" by inter-office mail. Exhibits were introduced by the parties supporting both the positions that the policies were and were not distributed to bargaining unit employees.

Committeeman Cornoyer testified that he participated in the last negotiations and the drug testing issue came up. When the Union asked about new hires being tested, the Company took the position that they had the right to take such steps. But the Company declined to discuss the issue further, describing the matter

as a "can of worms." The Company view, however, was that the matter of drug testing was not dealt with by the parties in prior negotiations.

Accordingly, from the Union viewpoint, it was not until October, 1989, that the Local Union and bargaining unit employees understood management's position that employees could be tested for drugs and terminated if positive results were found. In fact, Grievant Rafko was not the only employee required to submit to a test on October 5, 1989. Local Union President Frank White was also compelled to submit to the procedure, but ultimately was not disciplined.

As part of its efforts to handle the David Rafko grievance, the Union sent a series of letters to the Company requesting information about the Grievant and other matters relating to drug testing. On February 20, 1990, the Company sent the Union a memorandum in response. The Union was told that a total of 37 Monroe Equipment employees had been discharged for drug offenses, 8 of whom had been tested. As to the Local 878 bargaining unit, from 1987 through 1989, 4 employees had been tested, with 3 discharged and 1 suspended.

The following from the collective bargaining agreement bears on the outcome of this case:

"ARTICLE I

Recognition

"*SECTION 1.1. Recognition*. The Company recognizes the Union as the sole bargaining agency for all employees (as defined in Section 1.2 hereof) who are now on the payroll, and all employees (as defined in Section 1.2 hereof) who in the future are employed and placed on the payroll of the Company in Monroe County, Michigan.

* * *

"*SECTION 1.3. Negotiations.* The Company shall negotiate with the accredited representatives chosen by the Union for the purpose of settling any disputes which may arise concerning wages, rates of pay, working conditions, hours and all other conditions of employment, and to process and answer in accordance with the terms and conditions of Article IV any grievances or complaints which may exist or may arise in the future on any of these matters."

"ARTICLE II

Management's Rights

"*Functions.* The Company alone shall determine the manner and methods of operating its business without any conference with or interference on the part of the Union or any of its representatives, in the management and conduct of the Company's business: including, without limiting the generality of the foregoing, the following rights: — to suspend, discipline, discharge for just cause — to make and enforce reasonable shop rules and regulations — are among the responsibilities vested exclusively in the Company, unless such determination by the Company is exercised in conflict with the express terms of this Agreement."

"ARTICLE III

Representation

"*SECTION 3.1. Bargaining Committee.* (a) The Bargaining Committee shall consist of the President, the Recording Secretary and one (1) Committeeman. Such committee shall be recognized and dealt with for the purposes of negotiating a new working agreement and for other activities as are specifically provided in this Agreement.

"(b) Employees shall be represented by committeemen for each of the following areas:

1 Committeeman in Skilled Trades Classification

1 Committeeman in Non-Skilled Trades Classification

1 Committeeman for the Afternoon Shift

Each Committeeman shall have jurisdiction over his particular area and shall not attempt to settle grievances out of his prescribed area.

* * *

"*SECTION 3.4. Major Agreements.* Any major agreement reached between the Bargaining Committee and the Management shall be subject to the approval of the Local Unit and the International Union. Pending approval, the agreement reached by the Bargaining Committee and the Management (which does not require governmental agency approval), shall not be in effect. By 'major agreement' is meant any agreement which is contrary to this Contract or is not covered by the same."

"ARTICLE V

Disciplinary Action

"*SECTION 5.1. Notification of Suspension or Discharge.* If after meeting with the Bargaining Committee, suspension without pay or discharge becomes necessary the reason for such suspension or discharge shall be furnished in writing to the Union Committeeman, with a copy to the Human Resource Department at the time the employee is suspended or discharged.

* * *

"*SECTION 5.4. Reinstatement of Discharge.* Any employee who is reinstated after a discharge which is agreed to have been improper will be returned to work on his regular job without loss of seniority rights. Penalties or compensation, if any, shall be agreed on by the Company and the Union. It is mutually agreed that such grievance should be settled within ten (10) days.

"*SECTION 5.5. Other Disciplinary Action.*

"(a) To provide for the protection of employees, machinery, and property it may become necessary to discipline employees. Any employee who violates, ignores or disregards Company work rules will be subject to the following disciplinary action procedure. The employee has the right to request a committeeman's presence at any step.

"1. First Occurrence—The employee will receive a verbal warning from his supervisor which will be documented with a copy to the employee's committeeman.

* * *

"5. Fifth Occurrence—For the same or similar violation, the employee will be terminated in accordance with Section 5.1.

"It is not practical to have a work rule for every instance which may arise. Therefore, management will determine the appropriate level of discipline. Depending upon the seriousness and frequency of the violation(s), disciplinary action may be in the form as stated above or may result in immediate suspension or discharge."

FINDINGS AND CONCLUSIONS

I. The Charged Violations by the Company of Section 8(a)(5) of the National Labor Relations Act

The National Labor Relations Act provides that, "It shall be an unfair labor practice for an employer — to refuse to bargain collectively with the representatives of his employees —." The Union filed charges with the National Labor Relations Board alleging that, "since on or about early August, 1989 the Company has refused to bargain in good faith with the Union on drug testing and any disciplinary actions due to a drug test." Also charged was that thereafter the Company discharged three Union members and forced two others to submit to tests, but "has re-

fused to give the Union the results of the test, the name of the test or any other related information. The Company has unilaterally imposed this drug testing."

The Company's response is that as early as 1985, it issued an Alcohol and Drug Abuse Program policy statement which was distributed to the employees, and that a later version of same was issued in 1986 and similarly distributed. The Union position is that neither the employees nor Local Union were aware of the Company policies until October, 1989, when testing was inaugurated and Grievant Rafko was terminated.

It is the Arbitrator's credibility determination that the Company position regarding notification should be accepted. As indicated above, substantial evidence was received from the Company that the Alcohol and Drug Abuse policies were in fact distributed. These policies were major undertakings by the Company, and it would have made no sense for management to fail to impart the contents to the employees. Accordingly, the Company evidence for distribution outweighs the Union denials that there was no knowledge of the Company's position on drugs.

However, notwithstanding the Company 1986 statement that it "maintains the right to require any employee to take medically approved tests to determine if the employee is under the influence or has been using alcohol or illegal drugs," the evidence is that said policy was not implemented for bargaining unit employees until October, 1989. But the Union asserts that the drug testing issue came up in 1988 in connection with negotiations for the current contract. A Union witness testified that following consensus that the Company would test new hires, management declined to pursue the subject since it was a "can of worms."

The evidence suggests that the Company did not adopt its drug policies in accordance with Section 3.4 of the collective bargaining agreement or its counterpart in the parties' last contract. The drug policy was a "major agreement" since it was an "agreement

which is contrary to this contract or is not covered by the same." However, the time for the Union to protest the policy was following its announcement during the term of the last contract. Moreover, since the Union had the opportunity to challenge the Company's drug testing position during last negotiations and let the matter ride, it can not now be said that the Company acted in violation of Section 8(a)(5) of the Act when it later implemented its drug policies.

Nor does the Arbitrator believe that the Company violated the law in responding to the Union's request for information so that the instant grievance could be processed. While it is true that the Company responded neither speedily or completely to the Union's information request, it was abundantly clear at arbitration that the Union was not hampered in presenting its case. In the course of four days of hearing, it appeared to the Arbitrator that the Union was well able to respond to all significant Company assertions as well as present all needed evidence and arguments in the Grievant's defense. It follows that the Company did not violate Section 8(a)(5) with specific reference to David Rafko.

II. The Charge that the Company Interfered with the Grievant's 8(a)(5) Rights in Refusing to Provide Him Union Representation as Requested on October 5, 1989

David Rafko's request for Union Representation on October 5, 1989, and the Company's handling of same are undisputed. Thus, at approximately 1:00 p.m., the Grievant was ordered into Human Resources and told that he had to submit to a drug test. Rafko specifically asked to be represented by either Local Union President Frank White or Committeeman Don Copi, but the Company instead called on Union Vice-President Gerald Mansfield to represent him.

The parties agree that on the basis of *NLRB* v. *Weingarten, Inc.*, 420 U.S. 251, 88 LRRM 2689 (1957), the Grievant was entitled to Union representation under the circumstances. The only disagreement is whether Rafko was entitled to one of the

specific representatives he requested, so that his *Weingarten* rights were disregarded when Mansfield was called.

It is true that White and Copi were on the Bargaining Committee list submitted by the Union to the Company in accordance with Section 3.1 of the contract, while Mansfield was not on said list. But it is clear that Don Copi was not in the plant at the time, and that Frank White was himself involved in the drug testing controversy. With the two requested Union representatives unavailable, it does not appear that the Company acted unreasonably in not complying with the Grievant's request or that management's designation of Mansfield was for arbitrary or discriminatory reasons.

Moreover, as *Roadway Express, Inc.*, 246 NLRB 1127, 103 LRRM 1050 (1979), and other cases make apparent, an employee's *Weingarten* rights are not violated because a particular Union representative is not provided. Considering the circumstances and the law, it appears that the Company did not violate the Act in calling Mansfield to represent the Grievant.

III. Whether David Rafko Was Properly Suspended on October 5, and Then Discharged for "Just Cause" on October 12, 1989

The ultimate question in this case breaks down into two issues: whether the drug abuse policies that apply to the case are compatible with the contract, and, if so, whether the Company's proofs were adequate to sustain the Grievant's termination.

As has been concluded above, the Union may not now be heard to complain that the Company did not bargain before adopting its Alcohol and Drug Abuse policies. But that does not mean that the policies are compatible with the collective bargaining agreement or that their implementation in the case at bar was in accord with "just cause."

It is appropriate to begin by considering whether the Company had the right to subject the Grievant to drug testing in the

first place. As stated in *Wayne State University,* 87 LA 953, 957, your Arbitrator "sympathizes with the proposition that an employer's right to discipline should be confined to work-connected matters," and that, "generally speaking the employer has no right to discipline on the basis of the employee's off-duty behavior," because "the employee's private life is none of the employer's business."

But your Arbitrator added that, "the aforesaid approach does not apply when an employee's off-duty or off-workplace behavior affects the business or operation." It was also pointed out that the employer must bear the burden of demonstrating that off-duty behavior justifies discipline on the basis of the following:

> "The connection between the facts which occur and the extent to which the business is affected must be reasonable and discernible. They must be such as could logically be expected to cause some result in the employer's affairs. Each case must be measured on its own merits."[3]

Illegal drugs are a scourge on society and it is undebatable that their use and distribution can not be tolerated in the workplace. It follows that an employer has the right to use every reasonable means to combat such activities among its employees.

In the case at bar, management had been anonymously informed that the Grievant was a drug seller and user and subsequent investigation seemed to support the suspicion. While there can be no blanket approval for compelling employees to be drug-tested, under instant circumstances, the Company was justified in proceeding as it did.

But the determining question in this case is whether the test result warranted the Grievant's termination. It must be said that illegal drug use, reprehensible though it is, does not in itself justify discharge. Indeed, the Company policy provides for discipline

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[3]*Inland Container Corp.,* 28 LA 312, 314 (Ferguson, 1957), as set forth in *How Arbitration Works*, Elkouri and Elkouri, Fourth Edition, BNA, 1985, Page 657.

only for such off-premises drug use "which could adversely affect an employee's job performance or which could jeopardize the safety of other employees, the public, or Company equipment."

Accordingly, the matter boils down to whether the Company established that Rafko's use of marijuana had the above effects. Dr. Hayden pointed out that the reading of 242/ml of THC in the Grievant's urine was well above the range of 60 to 100 that is deemed significant. The Arbitrator accepts Dr. Hayden's opinion that the Grievant had probably consumed "more than one joint," possibly within the previous eight hours.

Certainly accepted is this expert witness's general statement that the use of marijuana can influence a person's judgement, behavior, and ability to perform coordinated tasks. However, in the course of his testimony, Dr. Hayden conceded that in the case of marijuana, there are no clearly established standards for determining the degree of being under the influence of the drug or even whether a person is "under the influence," as that term is generally understood.

This is different from the state of knowledge of being under the influence of alcohol. Because measurement is more practical and there have been extensive studies, it has been possible to establish legal definitions for being intoxicated by alcohol. This is simply not the situation as to marijuana at the present time.

The limited and tentative knowledge of the correlation between the use of marijuana and impairment is suggested in the following paragraph found on page 246 of the Barnett and Willette article:

> "The initial conclusions on presumptive levels of the drugs studied are shown in Table 7-7. As noted already, these concentrations are based on the single administration of low to moderate doses in controlled settings. Individuals that use or abuse these drugs may take larger and more frequent doses, and drug levels in these individuals will probably exceed the levels selected here. Because of this and the variability seen

between individuals, the levels presented must be considered threshold concentrations for the *possible detection of impairment*." (Emphasis added.)

Even more indicative that the state of knowledge as to impairment from use of marijuana is presently no more than preliminary, is the following concluding paragraph in the "Aircraft Pilot Performance" paper:

"The results suggest a need for concern about performance of those entrusted with complex behavioral and cognitive tasks within 24 hours after smoking marijuana. The subjects in this experiment were unaware of any effects on their performance, mood, alertness, etc. Some results may be applicable to other tasks, such as operating complicated heavy equipment or railway trains and switching procedures. *Further research on these complex tasks should continue in an attempt to define the point after smoking THC at which the performance of complex tasks returns to baseline.* Such research should be objectively measured and precisely quantified; otherwise, important differences in performance, may go unrecognized." (Emphasis added.)

There was no testimony of abnormal behavior by the Grievant on October 5, 1989, nor was there any indication that he did not properly perform his job. The Arbitrator, of course, can not dismiss the possibility that Rafko, even though he himself may have been unaware, may have been functioning at less than optimum level—but that is a possibility only.

The Company has relied on scientific evidence that is less than conclusive as to whether the Grievant's off-duty use of marijuana actually interfered with his job performance. The evidence does not suffice, either to demonstrate that discharge was warranted by terms of Company policy, or that there was just cause for such action.

AWARD

For all of the above reasons, it is determined that:

1. The Company did *not* violate Section 8(a)(5) of the National Labor Relations Act in:

a) refusing to bargain and provide information regarding drug testing policies and related discipline since early August, 1989;

b) refusing to provide the Union with the results of the drug test in the case of David Rafko.

2. The Company did *not* interfere with David Rafko's 8(a)(5) National Labor Relations Act rights in refusing to allow the President of the Local Union, the Committeeman or member of bargaining committee to represent him on October 5, 1989.

3. David Rafko was not suspended with pay on October 5, 1989, and then discharged for "just cause", effective October 12, 1989.

Grievant David Rafko will be returned to work on his regular job without loss of seniority rights as soon as practical following receipt of this Opinion and Award. In accordance with Section 5.4 of the collective bargaining agreement, the matter is remanded to the parties to determine "penalties or compensation, if any." The Arbitrator retains jurisdiction to resolve any dispute connected with the implementation of this Award.

/s/ NATHAN LIPSON

NATHAN LIPSON, *Arbitrator*

Dated this 22nd day of December, 1990
Ann Arbor, Michigan

21 U.S.C. § 801(2)

The Congress makes the following findings and declarations:

(2) The illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people.

29 U.S.C. § 654(a)

Each employer—

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

(2) shall comply with occupational safety and health standards promulgated under this Act.

41 U.S.C. § 701(a)(1)

(a) Drug-free workplace requirement. (1) Requirement for persons other than individuals. No person, other than an individual, shall be considered a responsible source, under the meaning of such term as defined in section 4(8) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(8)), for the purposes of being awarded a contract for the procurement of any property or services of a value of $25,000 or more from any Federal agency unless such person has certified to the contracting agency that it will provide a drug-free workplace by—

(A) publishing a statement notifying employees that the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited in the person's workplace and specifying the actions that will be taken against employees for violations of such prohibition;

(B) establishing a drug-free awareness program to inform employees about—

(i) the dangers of drug abuse in the workplace;

(ii) the person's policy of maintaining a drug-free workplace;

(iii) any available drug counseling, rehabilitation, and employee assistance programs; and

(iv) the penalties that may be imposed upon employees for drug abuse violations;

(C) making it a requirement that each employee to be engaged in the performance of such contract be given a copy of the statement required by subparagraph (A);

(D) notifying the employee in the statement required by subparagraph (A), that as a condition of employment on such contract, the employee will—

(i) abide by the terms of the statement; and

(ii) notify the employer of any criminal drug statute conviction for a violation occurring in the workplace no later than 5 days after such conviction;

(E) notifying the contracting agency within 10 days after receiving notice under subparagraph (D)(ii) from an employee or otherwise receiving actual notice of such conviction;

(F) imposing a sanction on, or requiring the satisfactory participation in a drug abuse assistance or rehabilitation program by, any employee who is so convicted, as required by section 5154 [41 USCS § 703]; and

(G) making a good faith effort to continue to maintain a drug-free workplace through implementation of subparagraphs (A), (B), (C), (D), (E), and (F).

(2) Requirement for individuals. No Federal agency shall enter into a contract with an individual unless such contract includes a certification by the individual that the individual will not engage in the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance in the performance of the contract.

Mich. Comp. Laws § 37.1103(f)(i)

For purposes of article 2, "handicap" does not include either of the following:

(i) A determinable physical or mental characteristic caused by the current illegal use of a controlled substance by that individual.

Mich. Comp. Laws § 37.1211(a)

A person may, under this article, do 1 or more of the following:

(a) Establish employment policies, programs, procedures, or work rules regarding the use of alcoholic liquor or the illegal use of drugs.

Mich. Comp. Laws § 257.625(1)

(1) A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general Public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if either of the following applies:

(a) The person is under the influence of intoxicating liquor or a controlled substance, or a combination of intoxicating liquor and a controlled substance.

(b) The person has a blood alcohol content of 0.10% or more by weight of alcohol.

Mich. Comp. Laws § 333.6201

(1) The office of substance abuse services is created as an autonomous agency within the department and shall exercise its powers and functions independently of the department except for budget, procurement, and housekeeping functions.

(2) The governor shall appoint an administrator for the office with the advice and consent of the senate. The administrator shall not be a member of the state classified civil service. The administrator shall receive compensation as provided by the legislature. The administrator shall serve as a special assistant to the governor on problems of substance abuse and shall serve as the chairperson of the interdepartmental committee on substance abuse.

Mich. Comp. Laws § 333.6203

With the assistance of the department, the office shall:

(a) Administer and coordinate, through the comprehensive state plan required by subdivision (e) and interdepartmental

contracts, as provided in section 6205(b), state administered public funds for substance abuse treatment and rehabilitation services and prevention services.

(b) Use appropriations of revenues from taxes imposed by Act No. 8 of the Public Acts of the Extra Session of 1933, as amended, being sections 436.1 to 436.58 of the Michigan Compiled Laws, and Act No. 213 of the Public Acts of 1972, being sections 436.131 to 436.133 of the Michigan Compiled Laws, exclusively for the purposes provided in those acts.

(c) Recommend directly to the governor, after review and comment by the commission, budget and grant requests for public funds to be allocated for substance abuse services including education, research, treatment, rehabilitation, and prevention activities.

(d) Provide technical assistance to substance abuse coordinating agencies and to treatment, rehabilitation, and prevention agencies in cooperation with the coordinating agencies for the purposes of program development, administration, and evaluation.

(e) Develop annually a comprehensive state plan through the use of federal, state, local, and private resources of adequate services and facilities for the prevention and control of substance abuse and the diagnosis, treatment, and rehabilitation of individuals who are substance abusers.

(f) Evaluate, in cooperation with appropriate state departments and agencies, the effectiveness of substance abuse services in the state funded by federal, state, local, and private resources, and annually during the month of November, report a summary of the detailed evaluation to the governor, legislature, commission, and committee.

Mich. Comp. Laws § 333.7401

(1) Except as authorized by this article, a person shall not manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance, a prescription form, an official prescription form, or counterfeit prescription form. A practitioner licensed by the administrator under this article shall not

dispense, prescribe, or administer a controlled substance for other than legitimate and professionally recognized therapeutic or scientific purposes or outside the scope of practice of the practitioner, licensee, or applicant.

(2) A person who violates this section as to:

(a) A controlled substance classified in schedule 1 or 2 which is either a narcotic drug or described in section 7214(a)(iv) and:

(i) Which is in an amount of 650 grams or more of any mixture containing that controlled substance is guilty of a felony and shall be imprisoned for life.

(ii) Which is in an amount of 225 grams or more, but less than 650 grams, of any mixture containing that controlled substance is guilty of a felony and shall be imprisoned for not less than 20 years nor more than 30 years.

(iii) Which is in an amount of 50 grams or more, but less than 225 grams, of any mixture containing that controlled substance is guilty of a felony and shall be imprisoned for not less than 10 years nor more than 20 years.

(iv) Which is in an amount less than 50 grams, of any mixture containing that substance is guilty of a felony and shall be imprisoned for not less than 1 year nor more than 20 years, and may be fined not more than $25,000.00, or placed on probation for life.

(b) Any other controlled substance classified in schedule 1, 2, or 3, except marihuana, is guilty of a felony, punishable by imprisonment for not more than 7 years, or a fine of not more than $5,000.00, or both.

(c) A substance classified in schedule 4 or marihuana, is guilty of a felony, punishable by imprisonment for not more than 4 years, or a fine of not more than $2,000.00, or both.

(d) A substance classified in schedule 5, is guilty of a felony, punishable by imprisonment for not more than 2 years, or a fine of not more than $2,000.00, or both.

(e) An official prescription form or a counterfeit official prescription form, is guilty of a felony, punishable by imprison-

ment for not more than 20 years, or a fine of not more than $25,000.00, or both.

(f) A prescription form or a counterfeit prescription form other than an official prescription form or a counterfeit official prescription form, is guilty of a felony, punishable by imprisonment for not more than 7 years, or a fine of not more than $5,000.00, or both.

(3) A term of imprisonment imposed pursuant to subsection (2)(a) or section 7403(2)(a)(i), (ii), (iii), or (iv) shall be imposed to run consecutively with any term of imprisonment imposed for the commission of another felony. An individual subject to a mandatory term of imprisonment under subsection (2)(a) or section 7403(2)(a)(i), (ii), (iii), or (iv) shall not be eligible for probation, suspension of that sentence, or parole during that mandatory term, except and only to the extent that those provisions permit probation for life, and shall not receive a reduction in that mandatory term of imprisonment by disciplinary credits or any other type of sentence credit reduction.

(4) The court may depart from the minimum term of imprisonment authorized under subsection (2)(a)(ii), (iii), or (iv) if the court finds on the record that there are substantial and compelling reasons to do so.

Mich. Comp. Laws § 333.7403

(1) A person shall not knowingly or intentionally possess a controlled substance or an official prescription form or a prescription form unless the controlled substance, official prescription form, or prescription form was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of the practitioner's professional practice, or except as otherwise authorized by this article.

(2) A person who violates this section as to:

(a) A controlled substance classified in schedule 1 or 2 which is either a narcotic drug or described in section 7214(a)(*iv*), and:

(i) Which is in an amount of 650 grams or more of any mixture containing that controlled substance is guilty of a felony and shall be imprisoned for life.

(ii) Which is in an amount of 225 grams or more, but less than 650 grams, of any mixture containing that controlled substance is guilty of a felony and shall be imprisoned for not less than 20 years nor more than 30 years.

(iii) Which is in an amount of 50 grams or more, but less than 225 grams, of any mixture containing that controlled substance is guilty of a felony and shall be imprisoned for not less than 10 years nor more than 20 years.

(iv) Which is in an amount of 25 grams or more, but less than 50 grams of any mixture containing that controlled substance is guilty of a felony, and shall be imprisoned for not less than 1 year and not more than 4 years, and may be fined not more than $25,000.00 or placed on probation for life.

(v) Which is in an amount less than 25 grams of any mixture containing that controlled substance is guilty of a felony, punishable by imprisonment for not more than 4 years or a fine of not more than $25,000.00, or both.

(b) A controlled substance classified in schedule 1, 2, 3, or 4, except a controlled substance classified in schedule 1 for which a penalty is prescribed in subdivision (a), (c), or (d), is guilty of a felony, punishable by imprisonment for not more than 2 years, or a fine of not more than $2,000.00, or both.

(c) Lysergic acid diethylamide, peyote, mescaline, dimethyltryptamine, psilocyn, psilocybin, or a controlled substance classified in schedule 5, is guilty of a misdemeanor, punishable by imprisonment for not more than 1 year, or a fine of not more than $1,000.00, or both.

(d) Marihuana, is guilty of a misdemeanor, punishable by imprisonment for not more than 1 year, or a fine of not more than $1,000.00, or both.

(e) An official prescription form, is guilty of a felony, punishable by imprisonment for not more than 1 year, or a fine of not more than $2,000.00, or both.

(f) A prescription form other than an official prescription form, is guilty of a misdemeanor, punishable by imprisonment for not more than 1 year, or a fine of not more than $1,000.00, or both.

(3) The court may depart from the minimum term of imprisonment authorized under subsection (2)(*ii*), (*iii*), or (*iv*) if the court finds on the record that there are substantial and compelling reasons to do so.